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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1968,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7101 *et seq.*, requires collective bargaining over union proposals seeking to establish procedures for the development of measures of employee performance and the arbitral resolution of disputes over such matters.

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v.

FEDERAL LABOR RELATIONS AUTHORITY,

*Respondent.**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRELIMINARY STATEMENT

The American Federation of Government Employees, AFL-CIO, Local 1968, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

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* All the parties in the proceeding before the court of appeals are listed in the caption. The Department of Transportation, on behalf of the Saint Lawrence Seaway Development Corporation, was a party before the Federal Labor Relations Authority from whose decision judicial review was sought. The Department of Transportation did not participate in the proceeding before the court of appeals.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-18a) [1] is reported at 691 F.2d 656. The decision and order of the Federal Labor Relations Authority (App. C, 44a-61a) is reported at 5 FLRA No. 14.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1982, and this petition has been filed within 90 days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case primarily involves Title VII of the Civil Service Reform Act of 1978 ("Reform Act"), Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. (Supp. V) 1101 *et seq.*, commonly known as the Federal Service Labor-Management Relations Statute ("statute"), 5 U.S.C. (Supp. V) 7101 *et seq.* (App. F, 101a-153a). This case also involves Title II of the Reform Act and regulations of the Office of Personnel Management, insofar as they pertain to the performance appraisal of federal employees, 5 U.S.C. (Supp. V) 4301 *et seq.* (App. G, 154a-160a), and 5 C.F.R. 430.101 *et seq.* (1980) (App. H, 161a-170a), respectively.

STATEMENT OF THE CASE

Petitioner, American Federation of Government Employees, AFL-CIO, Local 1968 ("AFGE" or "union") is a labor organization representing federal employees of the Department of Transportation, Saint Lawrence Seaway Development Corporation ("agency" or "employer") (App. C, 44a).

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[1] The appendicies are set forth in a separately bound document accompanying this petition.

During negotiations, the employer refused to bargain over the union's proposals relating to the employer's system for appraising the work performance of employees. (App. A, 3a; App. C, 44a-61a). Specifically, the employer refused to bargain over proposals which sought to establish bilateral participation in the development of measures of employee performance and to allow the parties to grieve disputes involving performance appraisal matters (App. A, 3a-5a; App. C, 44a, 47a, 52a, 53a).

The employer refused to bargain over the italicized portions of two proposals, set out in part as follows:

PROPOSAL III

Section 4. There shall be no secret studies bearing on performance appraisals. All studies conducted by the [employer] will be conducted on typical workers under normal working conditions. *The [u]nion shall participate on an equal basis in the development or revisions of all measures of performance and studies including but not limited to selection of typical workers and conditions. If agreement cannot be reached, formal negotiations will be convened. Any impasses will be referred to the Federal Service Impasses Panel for resolution.*

PROPOSAL IV

Section 6. Any disputes under this Article may be resolved under the negotiated grievance procedure including but not limited to:

1. *Challenges to critical elements of position.*
2. *The measure of performance as set forth in performance standards.*[2]

(App. A, 4a-5a; App. C, 52a-53a).

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[2] "Performance standards" and "critical elements" are defined by regulation as follows:

"Performance standards" are the expressed measure of the level of achievement . . . for the duties and responsibilities of a

AFGE, pursuant to 5 U.S.C. (Supp. V) 7117,[3] appealed the employer's refusal to bargain over these proposals to the Federal Labor Relations Authority ("FLRA").[4] The

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position or group of positions. [They] may include, but are not limited to, elements such as quantity, quality, and timeliness.

"Critical elements" means a component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action . . . and may be the basis for removing or reducing the grade level of that employee.

5 C.F.R. 430.202(d) and (e) (1980).

Only the proposals set forth in the text are pertinent to this petition. AFGE had attempted to negotiate other proposals, including two proposals later declared nonnegotiable by the Federal Labor Relations Authority ("FLRA"), that sought to equate the critical elements of an employee's position with the grade controlling factors of the position (App. C, 44a-52a). The FLRA's ruling on these proposals was upheld by the court of appeals (App. A, 15a). AFGE does not seek review of the court's findings on these proposals. The FLRA declared negotiable that portion of Proposal IV which reads: "Any disputed action taken as a result of a performance appraisal will be treated as any other disciplinary matter" (App. C, 54a). The employer chose not to seek judicial review of this finding.

[3] Unless otherwise indicated, all subsequent statutory references are to title 5 of the United States Code (Supp. V).

[4] Title VII of the Reform Act establishes a framework for the conduct and administration of labor-management relations within the federal service. Prior to its enactment, labor-management relations within the federal government was established under a series of executive orders, beginning with Executive Order 10988, 27 Fed. Reg. 551 (1962), as revised and continued by Executive Order 11491, 34 Fed. Reg. 17609 (1969), as amended by Executive Orders Nos. 11616, 11636, and 11838, 36 Fed. Reg. 17319, 24901 (1971) and 40 Fed. Reg. 5743 (1975).

The FLRA is charged with administering the statute. Section 7105. It is an independent agency within the executive branch, with three members appointed by the President with the advice and consent of the Senate. See section 7104. Its role is analogous to that of the National Labor Relations Board ("NLRB") under the National Labor Relations Act. See 29 U.S.C. 151 *et seq.* Thus, the FLRA is required, among the responsibilities, to determine the appropriateness of units for collective bargaining, conduct repre-

FLRA denied AFGE's appeal, declaring that the proposals were nonnegotiable. In reaching this determina-

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sentation elections, and resolve allegations of unfair labor practices. Section 7105(a)(2)(A), (B), and (G). Additionally, the FLRA, as a result of some differences in the structural mechanisms established by the two statutes, also is responsible for resolving exceptions to arbitration decisions, section 7122, a role performed by the courts in the private sector; and resolving, through a prescribed statutory procedure, negotiability disputes, section 7117, a function performed by the NLRB through its usual unfair labor practice procedures. Further, under the statute, the Federal Service Impasses Panel ("Impasses Panel"), an entity within the FLRA, along with the Federal Mediation and Conciliation Service ("FMCS"), section 7119, is responsible for resolving negotiation impasses, which, in the private sector, are adjusted by forces and processes external to the NLRB. Final orders of the FLRA are subject to judicial review in the courts of appeals. Section 7123(a).

The statute requires that unions, as exclusive bargaining representatives, and agency-employers negotiate in good faith for the purpose of arriving at a collective bargaining agreement. Section 7114(a)(4).

Disputes relating to the negotiability of a proposal—often relating to a contention by an agency that a proposal interferes with its reserved authority under section 7106(a)—the management rights provision of the statute—can be resolved under alternative procedures. In the first instance, a union may challenge the agency's position by filing an unfair labor practice charge alleging a refusal to bargain in good faith. Section 7116(a)(5). In the second instance, as was the case here, the parties may obtain a ruling by the FLRA on the negotiability of a particular proposal. Section 7117. Under this procedure, a union, after management's refusal to negotiate over a proposal, petitions the FLRA for a determination as to the negotiability of the proposal at issue. *Id.* After submission by the parties of their statements of position, the FLRA issues a written decision and order. *Id.* The bargaining order does not require the parties to do anything other than to bargain in good faith over the proposals. The parties are not required to include the proposals, as written, within their collective bargaining agreement, nor are they even required to include the subject matter of the proposal in their agreement.

If the parties are unable to reach agreement over a proposal, procedures are prescribed for resolving the impasse. Section 7119. As an initial step, the parties voluntarily may seek to utilize the

tion, the FLRA, relying in large part upon its earlier decision in *National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt*, 3 FLRA No. 119 (1980) (App. D, 62a-82a), *aff'd sub nom. National Treasury Employees Union v. FLRA*, 691 F. 2d 553 (D.C. Cir. 1982) (App. B, 19a-43a), held that the proposals were outside the duty to bargain because the proposals, if agreed to by the parties, would interfere with the employer's authority to direct employees and assign work under section 7106(a) (App. C, 46a-47a, 53a, 55a-57a).

With regard to the proposals that sought to establish bilateral participation in the development of measures of performance, the FLRA stated: "[This] proposal would require bargaining to impasse concerning the particular performance standards to be established for employees in the bargaining unit [, and, thus,] bears no material difference in effect from the proposal . . . in *Bureau of the Public Debt*" (App. C, 53a; see App. A, 15a-16a).

With regard to the proposal that sought to allow the parties to grieve disputes over performance appraisal matters, the FLRA, citing its decisions in *Bureau of the Public Debt* and *American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C.*, 3 FLRA No. 120 (1980) (App. E, 83a-100a) concluded:

> [This proposal], by providing for grievances which challenge the [a]gency's identification of the critical

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services of the FMCS. Section 7119(a). If agreement still cannot be reached, either party may invoke the processes of the Impasses Panel. Section 7119(b). The members of the Impasses Panel are appointed by the President, and they are familiar with government operations and knowledgeable in labor-management relations. Section 7119(a)(2). The Impasses Panel, either upon request by the parties, or by its own order, may require the resolution of an impasse through binding arbitration; alternatively, it may order the parties to submit the impasse to factfinding and recommendations or require the use of other dispute resolution mechanisms. Section 7119(b)(2) and 7119(c)(5).

> elements of a position and establishment of performance standards, would permit negotiated grievance procedures to extend to the [a]gency's exercise of its rights to direct employees and to assign work under section 7106(a)(2)(A) and (B). . . . [T]he proposal thereby would subject the [a]gency's exercise of these reserved rights to arbitral review and therefore to the possibility of arbitrators substituting their judgment for that of the agency with respect to those statutory rights. That is, [the proposal] would, in effect, permit arbitrators to overturn the [a]gency's identification of critical elements and establishment of performance standards and to render awards which would require the [a]gency to use different standards, contrary to the [a]gency's rights under the [s]tatute.

(App. C, 57a-58a).

AFGE sought judicial review of the FLRA's decision under section 7123(a). On appeal, AFGE raised three issues: (1) whether the plain language of the statute and its legislative history compelled the conclusion that the proposals were negotiable; (2) whether the FLRA's decision was arbitrary and capricious in that it lacked a reasoned articulation as to either why the proposals were proscribed by section 7106 or why the proposals were not negotiable under *Bureau of the Public Debt* and *AFGE, Local 32*; and (3) whether the FLRA had usurped the role of the Federal Service Impasses Panel ("Impasses Panel") by basing its determination on its assessment of the merits of the proposals rather than their negotiability under the statute (App. A, 8a-18a).[5] In affirming the FLRA's decision, the court of appeals ruled against AFGE on each issue (*id.*).

The court of appeals first held that several points raised by AFGE had been effectively disposed of by that court's decisions in *Department of Defense v. FLRA*, 659 F. 2d 1140 (D.C. Cir. 1980), and *National Treasury*

[5] See note 4.

Employees Union v. FLRA, 691 F. 2d 553 (D.C. Cir. 1982) (App. B, 8a), *aff'g Bureau of the Public Debt. Department of Defense* was rendered after submission of the union's principal brief in this case and *National Treasury Employees Union* was announced contemporaneously with the court's decision in this case (*id.*). The court's reference to *Department of Defense* apparently was intended to support the court's conclusion that section 7106(b), though literally providing for the negotiation of the two proposals here at issue, could not be so read if their adoption by the parties, in the FLRA's judgment, would interfere with authority reserved to management under section 7106(a) (App. A, 13a). The court's reference to *National Treasury Employees Union* apparently was intended to support the court's conclusion that the FLRA did not err in finding that the negotiation of performance standards and critical elements would impermissibly impede the authority of agency management to direct employees and assign work (App. A, 9a), rights which the court, in *National Treasury Employees Union*, characterized as "at the very core of successful management of the employer's business whether a private sector enterprise or the public service operations of a federal agency" (App. B, 38a). Additionally, both *National Treasury Employees Union* and *Department of Defense* contain statements, demonstrating the court of appeal's willingness to give substantial deference to the FLRA's negotiability determinations. (App. B, 29a, 35a; 659 F. 2d at 1161-1162).

The court, after stating its rejection of AFGE's construction of section 7106 (App. A, 13a), then rejected AFGE's argument that the FLRA's decision could not withstand judicial scrutiny because the FLRA has misapplied *Bureau of the Public Debt* and *AFGE, Local 32* (App. A, 15a-18a). In this regard, the court stated: "[P]roposal III, requiring as it does formal negotiations on measures of performance and further requiring referral of hopelessly-mired disputes to the Impasses Panel,

would [similar to the proposals in *Bureau of the Public Debt*] . . . restrict management's authority in that area by insisting that it be exercised only with union approval" (App. A, 15a-16a).

With regard to AFGE's contention that the FLRA had failed to articulate any basis for its departure from its finding in *AFGE, Local 32* that a union could grieve whether a performance standard was fair and equitable and consistent with the classification standards for the job (App. E, 92a-93a, 96a-99a; see App. A, 16a), the court stated that there was no such departure in this case because here, unlike in *AFGE, Local 32*, the proposals would allow arbitrators to "substitute their notions of proper [performance] standards and [critical] elements for those of management" (App. A, 16a).[6] The court

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[6] In finding a similar proposal negotiable in *AFGE, Local 32*, the FLRA stated:

> [A]n agency has the duty to bargain . . . on appropriate arrangements for employees adversely affected by management's exercise of its authority under section 7106(a), *i.e.*, actions taken under such standards. . . . Accordingly, insofar as the proposal here merely would establish a general, nonquantitative requirement by which the application of critical elements and performance standards may subsequently be evaluated in a grievance by an employee who believes that he has been adversely affected by the application of management's performance appraisal to him . . . , it is within the duty to bargain. Thus, an employee against whom management takes disciplinary action for unacceptable performance may, in a grievance of such action pursuant to section 7121 (a) of the [s]tatute raise the issue of whether the performance standards as applied to him meet the contractual requirements.

(App. E, 96a). The proposal in *AFGE, Local 32* read:

> All performance standards will be fair and equitable. . . . An employee who believes a standard does not meet the above criteria may grieve. . . .

(App. E, 92a-93a). The FLRA relied upon its finding in *AFGE, Local 32* in declaring negotiable a portion of Proposal IV in this case (App. C, 58a-59a). See note 2.

also rejected AFGE's contention that the FLRA had usurped the role of the Impasses Panel by stating that AFGE's position was not supported by the statutory scheme established by Congress (App. A, 18a, n. 88).

REASONS FOR GRANTING THE PETITION

In enacting the labor-management relations title of the Civil Service Reform Act of 1978, Congress intended to provide a means for labor and management to bargain collectively over conditions affecting employment within the federal service. This basic purpose of the statute has been undermined by the FLRA's finding in this case that section 7106(a) prohibits bargaining over proposals which (1) would establish bilateral participation in the formulation of measures of employee performance and (2) would enable the parties to effectively grieve disputes relating to the validity of performance standards and critical elements.

In enacting the statute, Congress intended that labor and management would be able to engage in collective bargaining over meaningful conditions of employment, including the appraisal of employee work performance. With regard to the evaluation of employee performance, Congress intended that the then existing system of appraisal should be replaced so as to provide a more valid means for evaluating employee performance. The new system would be used for recognizing and rewarding good performance, assisting employees in improving their performance, and, as necessary, reassigning, demoting, or discharging employees whose performance was unacceptable. Section 4301; see *National Treasury Employees Union* (App. B, 23a-24a). Moreover, Congress intended that this new system of appraisal would be developed only after "employee participation in establishing performance standards." Section 4302(a)(2). Yet notwithstanding the obvious and extensive impact of such systems on employees and the express mandate for employee participa-

tion in the development of such systems, the FLRA has interpreted section 7106, the "management rights" provision of the statute, in a manner which denies unions an effective means to negotiate and grieve in this important area. The FLRA's decision and the court of appeal's affirmance of that ruling are in error. Moreover, since the extent to which labor and management in the federal sector are obliged to bargain over matters relating to performance appraisal systems is an important and recurring question, review by this court is clearly warranted.

1. The plain language of the statute compels the conclusion that the proposals here at issue are negotiable.

a. Under the statute, "collective bargaining" and "conditions of employment" are defined very broadly. Section 7103(a)(12) and (14). The only limitations upon the obligation and duty to bargain over matters affecting employee working conditions are those relating to political activity, the grade classification of particular positions and matters specifically provided for by federal statute. Section 7103(a)(14).[7] Except for those areas, an obligation exists to negotiate over every subject matter affecting employee working conditions even though the right to negotiate over particular proposals may be limited in some respects by section 7106(a).

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[7] Section 7103(a)(14) reads:

"[C]onditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by federal statute.

Section 7106 reads in pertinent part:

> (a) *Subject to subsection (b)* of this section, nothing in this chapter shall affect the authority of any management official of any agency—
>
> * * * *
>
> (2) In accordance with applicable laws—
>
> (A) To . . . assign [and] direct . . . employees in the agency;
>
> (B) To assign work. . . .
>
> (b) *Nothing in this section shall preclude . . . negotiating—*
>
> * * * *
>
> (2) Procedures which management officials . . . will observe in exercising any authority under this section. [Emphasis added.]

Thus, as Congress makes clear by its use of the words "subject to [the provisions of] subsection (b)," the authority reserved to management under section 7106(a) has been subordinated to the general obligation to negotiate all procedures relating to the exercise of the reserved authority.

Contrary to the conclusion reached by the FLRA and the court of appeals, the statute places no limitation on the right of parties to negotiate procedures relating to the direction of employees or the assignment of work, even if a proposal would somehow "interfere" with managerial authority in this area, a finding by the FLRA with which AFGE takes issue.[8]

That Congress intended, as evidenced by the language in section 7106, that proposals of the type here at issue would be negotiable is bolstered by the language in section 4302(a)(2), mandating that "employee participation" is a prerequisite to the establishment of performance appraisal systems. This language suggests not only

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[8] See discussion at 22-23.

that Congress intended that employees, through their bargaining representatives, play an important role in establishing performance appraisal system, but that *employee participation was an essential element of such systems even in the absence of a collective bargaining relationship.* This position is supported by the requirement of section 4302(b)(1) that "performance standards . . . , to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria." Without employee input—through their elected bargaining representative, where available to employees—there would be no way to achieve the accurate and objective evaluation required by Congress.[9]

The above statutory provisions support the negotiability of both proposals at issue in this case. Additional support for the negotiability of the proposal to allow the parties to grieve performance standards and critical elements may be found under section 7121, which provides that collective bargaining agreements "shall provide procedures for the settlement of grievances." Section 7103(a)(9) defines "grievance" as:

> [A]ny complaint—
>
> (A) by any employee concerning any matter relating to the employment of the employee;
>
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
>
> (C) by any employee, labor organization, or agency concerning—
>
> * * * *
>
> (ii) any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment.

The only restrictions upon this broad definition of a grievance are contained in section 7121(c). None of

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[9] See discussion at 24, n. 17.

those exceptions pertain to matters related in any way to employee performance appraisal.

b. Although the court of appeals in *Department of Defense* observed that "the language of section 7106 . . . establish[es] a hierarchy in which the terms of subsection (b) hold priority over those of subsection (a)," the court rejected AFGE's contention that procedural proposals, *qua* procedures, were negotiable. 659 F. 2d at 1153. There the court of appeals characterized AFGE's construction as "constrictively literalist," suggesting that this construction ignored the intent of Congress to establish a "balanced statute." 659 F. 2d at 1159, 1160. In the instant case, the court recalled its discussion on this point in *Department of Defense*, stating:

> [I]n *Department of Defense* . . . we suggested the importance of drawing the line between proposals involving purely procedural steps and proposals "cast in procedural language [which] impinge upon substantive management decisions." The former are removed from the collective bargaining process only to the extent to which they preclude management from "acting at all," while the latter are similarly immune if their implementation would "directly interfere" with the agency's exercise of rights reserved by [s]ection 7106(a).

(App. A, 13a).

The court of appeals, like the FLRA, is mistaken in its construction of section 7106. While Congress certainly intended to create a "balanced" statute—a *sina qua non* for the development of a labor-management relations system—the structure of section 7106 reflects that "balance." The balance struck is that management retains the right to exercise authority in several specified areas; however, that authority is subordinated to the right of unions to negotiate with management over *any procedure* relating to its exercise as long as management is not prevented from "acting at all." Recognition that Congress already

has struck the balance between the obligation to bargain and reserved management authority demonstrates both the court's substantive error and its error in giving substantial deference to the FLRA (App. A, 13a); see *National Treasury Employees Union* (App. B, 29a, 35a). As stated by this court in *NLRB v. Brown*, 380 U.S. 278, 291-292 (1965), *quoting American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 318 (1965), "the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."

Contrary to the court of appeals, there is nothing in the statute, nor in the FLRA's decision, suggesting that the "direct interference" standard should be applied rather than the "acting at all" standard in determining the negotiability of a proposal. The "acting at all" standard, which is selectively applied by the FLRA in negotiability cases, *e.g. American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey*, 2 FLRA No. 16 (1979), and *American Federation of Government Employees, AFL-CIO, Local 547 and Veterans Administration Medical Center, Tampa, Florida*, 4 FLRA No. 50 (1980), has been approved by two courts of appeals. *Department of Defense*, 659 F. 2d at 1157-1158; and *Veterans Administration Medical Center, Tampa, Florida v. FLRA*, 675 F. 2d 260, 262-265 (11th Cir. 1982). As stated by the Eleventh Circuit:

> The statute itself clearly contemplates that . . . management's substantive rights will be subject to the negotiation of procedures under § 7106(b), and it does not specify any limit on procedures that may indirectly undermine the substantive rights. Thus, the "acting at all" standard seems a natural reading of the statutory language.

675 F. 2d at 263.

The "acting at all" standard, unlike the "direct interference" standard, is properly weighted to reflect the supremacy of section 7106(b) over section 7106(a). Although there is no magic attached to the label, its words capture the essence of section 7106; a contract procedure is lawful so long as it does not foreclose an agency from "acting at all" in the exercise of its managerial authority. The standard is consistent both with the supremacy of section 7106(b) and the canon of statutory construction requiring that all parts of a statute be read together in a manner which gives effect to each of its provisions. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955). Under this approach, the language of both section 7106(a) and 7106(b) is given effect so long as a proposal, crafted in procedural language, does not prevent an agency from "acting at all."

The "acting at all" standard stands in stark contrast to the "direct interference" standard applied by the FLRA in the instant case. By applying the latter standard, the FLRA attempts to insure that an agency is managed according to some perceived norm. The FLRA turns its inquiry into an assessment of how far a proposal can go before it becomes too burdensome to management, rather than merely determining whether a proposal prevents an agency from exercising its ultimate authority. Such inquiry by the FLRA fails to give effect to the language of section 7106(b), because it allows a proposal to be found nonnegotiable even where it does not negate an agency's authority. Such an inquiry, of course, requires the FLRA to examine the merits of a proposal, a role presumably better performed by management at the bargaining table or, if necessary, by the Federal Service Impasses Panel.

The "direct interference" test forces the FLRA to determine the merits of a proposal, thereby destroying the neutral role intended it by Congress. By "screening out" proposals which, if imposed in their existing form, could

have an impact upon management's reserved authority (even though not negating the exercise of such authority), the FLRA, in effect, reads out of the statute the role intended for the Impasses Panel. Congress intended that the negotiation process and the possibility of impasse resolution, not negotiability determinations by the FLRA, would result in the establishment of procedures that represent a workable accommodation between labor and management. The process of negotiation is a powerful constraint against the adoption of any proposal that would have an impermissible effect upon a management prerogative.[10] *See Dix-McGuire Exchange*, 2 FLRA at 156-158 (1979).

2. The legislative history of the statute evidences a strong recognition by Congress that collective bargaining would be stifled if the FLRA attempted to read section 7106 as a broad restriction upon bargaining.

As stated by Representative Udall, in the sectional analysis accompanying the substitute bill which he sponsored and which became law (see *National Treasury Employees Union*, App. B, 30a-31a):

---

[10] The court of appeals upheld the FLRA's decision in the instant case, in part, by referring to the provision in the statute that it "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." Section 7101(b) (see App. A, 15a; *National Treasury Employees Union*, App. B, 33a-35a). The reliance by the court of appeals on this provision is mistaken. As stated by the Eleventh Circuit in *Veterans Administration, Medical Center, Tampa, Florida*:

> [This argument] misses the mark by challenging the union's proposed procedure, and not its negotiability alone. We express no opinion as to the merits of the procedure; we hold only that the agency must sit down at the bargaining table with the union to discuss the procedure. A finding of negotiability simply is not a requirement that the agency accept procedures capable of causing [unreasonable results].

675 F. 2d at 265.

> [T]he "management rights" section . . . is to be treated narrowly as an exception to the general obligation to bargain over conditions of employment.[11]

The statements by Representatives Ford and Clay, who also were strong supporters of the statute (see *National Treasury Employees Union*, App. B, 32a, 33a), are instructive on this point. As stated by Representative Clay:

> As the sectional analysis makes clear, the management rights [provision] is to be construed as a narrow exception to the general obligation to bargain in good faith. . . .
>
> If the [FLRA] is faithful to these interpretative guidelines [as set forth in the legislative history], the ultimate exercise of the specified managerial responsibility, the only subject exempted from the bargaining obligation, will be protected and the general obligation to bargain over conditions of employment will be unimpaired. However, it is essential that only those proposals that directly and integrally go to the specified management rights be barred from the negotiation.[12]

Representative Ford expressed similar concerns regarding the interpretation of the management rights provision:

> Too often the [Federal Labor Relations] Council [, the FLRA's predecessor,] interpreted the management rights [provision] so broadly as to stifle an attempt by both management and employees to address commonly recognized problems. . . .
>
> A principal goal in revising the management rights [provision] is to change the current situation

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[11] 124 Cong. Rec. 29183 (1978), as *reprinted* in House Comm. on Post Office and Civil Service, 96 Cong. Rec. 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* ("*Legislative History*").

[12] 124 Cong. Rec. 29187 (1978), *Legislative History*, 931-933.

> and, wherever possible, encourage both parties to work out their differences in negotiation. . . .
>
> [T]he committee . . . intended . . . that the listed management rights were to be narrowly construed exceptions to the general obligation to bargain . . . and that section 7106 "be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or proposal."
>
> * * * *
>
> The concept of negotiability is and must be a dynamic and growing one. If not, [f]ederal sector labor relations must fail because the energies of management and labor will be diverted from consideration of important labor relations problems to the litigation of the scope of exceptions to the general bargaining obligation.[18]

Moreover, the only legislative history directly on point indicates that performance standards would be negotiable. Alan K. Campbell, the Director of the Office of Personnel Management at the time the Reform Act was being considered by Congress, and James M. Hanley, then Chairman of the House Post Office and Civil Service Committee, engaged in the following colloquy during a hearing on the legislation:

> Mr. Hanley: What are your views in making performance appraisal systems subject to collective bargaining?
>
> Mr. Campbell: As I understand that situation today, the current performance appraisal system is contained in the statute. The new law will permit agencies to develop their own performance appraisal systems. Unless the agency violates government-wide regulations [which the proposals here at issue do not], the performance appraisal evaluation systems will come within the area of matters which may be bargained.

---

[18] 124 Cong. Rec. 29198-29199 (1978), *Legislative History*, 953-956.

Mr. Hanley: But not subject to?

Mr. Campbell: It would be subject to bargaining to the extent that there is discretion. And this law allows a great deal more discretion then has been the case before in the development of those performance standards within the departments and agencies.[14]

Thus, the FLRA's constructive view of collective bargaining, as evidenced by the decision in this case, cannot be reconciled with either the plain language of section 7106 or its legislative history.

As evidenced by the legislative history, Congress intended that the scope of collective bargaining would be increased, not reduced, by the FLRA from that which was permitted under the executive order program by the Federal Labor Relations Council ("FLRC" or "Council"). However, the conclusions reached by the FLRA in the instant case and in *Bureau of the Public Debt* have reduced the scope of collective bargaining over performance appraisal matters from that which existed under the executive orders.[15] In *Patent Office Professional Association v. U.S. Patent Office, Washington, D.C.*, 3 FLRC 635 (1975), the FLRC held negotiable a proposal which established a method for setting production goals

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[14] House Comm. on Post Office and Civil Service, *Hearings on H.R. 11280, A Bill to Reform the Civil Service Laws*, 95th Cong., 2d Sess. (1978), 777.

[15] In considering the applicable legislative history, the court of appeals appears to have ignored its admonition that an allegation that a FLRA decision represents an impermissibly narrow view of collective bargaining requires "special scrutiny" by the court to determine whether "the FLRA has simply followed old practices and not adopted the revised mandates [intended by Congress]." *National Federation of Federal Employees, Local 1451 v. FLRA*, 652 F. 2d 191, 193 (D.C. Cir. 1981) (citing remarks by Representative Ford: "[I]n establishing judicial review we expect that the courts will scrutinize the actions of the [FLRA] with less of the deference given other administrative agencies.") 124 Cong. Rec. 38718 (1978), *Legislative History*, 1000.

and designating various levels of individual employee production as evidence in evaluating an employee's performance. As described by the FLRC:

> [T]he union's proposal set out a formula using historical and current data with regard to . . . the total number of examining hours actually worked by each examining group and assigned goals . . . to arrive at an "average historical complexity factor" and an "average individual [current] complexity factor" for each examining group. [The proposal] then directs that adjustments be made in each examiner's currently assigned goals . . . so that the examiners . . . [would] not be assigned . . . goals which would require them to complete the examination of a typical patent application in fewer hours than were taken to complete similar applications in the base period.

3 FLRC at 640-641.

Thus it is incredible that the proposals in this case, much less intrusive into management's authority to control workload and assignments, would be found nonnegotiable. Indeed there is no explanation by the FLRA as to why the rationale employed in the *Patent Office* case should not similarly control the issues here and in *Bureau of the Public Debt.* In the *Patent Office* case, the FLRC held:

> [T]he Council finds that the provisions of the proposal . . . neither purport . . . to limit, nor are intended to limit, the amount or type of work which management might assign to individual examiners or examining groups. Likewise, neither the language nor intent of the provisions prescribe how such work will be distributed by management among those individuals or groups which management determines are available to perform it. . . . [R]ather, the provisions are concerned with production expectations insofar as they may ultimately relate to the performance evaluation of individual examiners. . . .

> [T]he agency has failed to demonstrate that these proposed provisions would necessarily prevent management . . . to maintain the efficiency of its operation. In this regard, management's concern that [the] goals which would be established by the proposed provisions would tend to [interfere with the agency's operations] . . . is not a reason which would prevent negotiation of the provisions. . . . The obligation to negotiate does not imply a concomitant obligation to agree to a proposal. . . . [Contentions by management that a proposal would interfere with its responsibility to maintain efficiency of government operations] may not be invoked to deny negotiations unless there is a substantial demonstration . . . that increased costs or reduced effectiveness in operations are inescapable and significant and are not offset by compensating benefits.

3 FLRC at 641-642.

3. The reasoning offered by the FLRA in support of its decision does not withstand scrutiny. There is no rational basis to the FLRA's determination that the proposals here at issue would impermissibly intrude upon any reserved rights of management. AFGE's proposals in the instant case, unlike the proposal at issue in *Bureau of the Public Debt*, do not seek to quantify a measurement of performance. Thus, it is improper, as the FLRA has done in this case, to summarily conclude upon the basis of *Bureau of the Public Debt* that the instant proposals are nonnegotiable. Neither proposal seeks to set the level of work to be performed by employees. Instead, consistent with the requirement of section 4302 (a) (2) that agencies utilize employee participation in establishing performance standards, AFGE's first proposal merely provides a means by which such standards and critical elements will be developed. Further, AFGE's second proposal merely provides that disputes over such performance standards or critical elements may be grieved and, if necessary, presented to an arbitrator for resolution.

Thus, even if management's authority to "direct" and "assign" under section 7106(a) is as expansive as suggested by the FLRA in *Bureau of the Public Debt*, there is no rational explanation by the FLRA as to how the proposals in this case would interfere with such authority. Neither proposal relates to the direction of employees or assignment of work. Rather, as their language makes clear, the proposals are concerned solely with the procedures for evaluating employee performance and the resolution of disputes relating to the validity and application of critical elements and performance standards. There is simply no relationship, never mind one which would give rise to "direct interference," between, on the one hand, directing an employee and assigning work to him and, on the other hand, making *post hoc* decisions about the consequences of an employee's success or failure in carrying out an assignment or directions. These are two separate and distinct phases of personnel management. None of the proposals would allow AFGE to interpose itself between a manager and an employee at the point where a lawful order to perform a task is being given. Under AFGE's proposals, a manager retains his full authority to direct and assign all work regardless of whether the union has a role in the development of measures of performance or whether an arbitrator is given an opportunity to resolve disputes over performance standards and critical elements.

At the crux of the FLRA's decision appears to be a reluctance to allow negotiability over the proposals because they would, at a minimum, delay the application of a standard and element to a particular employee.[16]

---

[16] The FLRA's decision ignores that it is common practice in the public and private sector for matters such as production standards or evaluation systems to be grieved prior to their application to individual employees. *See e.g., U.S. Postal Service*, 67 Lab. Arb. (BNA) 133, 135 (1976), (Garrett, Arb.) (arbitration of U.S. Postal Service's letter carrier route evaluation systems); *Union Carbide Corp.*, 70 Lab. Arb. (BNA) 201 (1978) (Jones, Arb.); *Vermont American Co.*, 70 Lab. Arb. (BNA) 1041 (1978) (Moran,

Thus, with regard to the proposal that there be bilateral participation in establishing measures of performance, the FLRA's primary concern appears to be that bargaining to impasse over such matters might impede management authority (App. C, 53a).[17] Similarly, with regard to the proposal that would enable the parties to grieve disputes over performance standards and critical elements, the concern appears to be that this would delay application as well as allow a third party, *i.e.*, the arbitrator, to substitute his views for those of the agency on such matters (App. C, 57a-58a). However, this concern is directly contrary to the FLRA's holdings in *Dix-McGuire Exchange* and *Veterans Administration Medical Center, Tampa, Florida*, as approved by the District of Columbia (*aff'd in Department of Defense*) and Eleventh Circuit Courts of Appeals that delay is not an acceptable

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Arb.). If an agency in a particular case believed that an arbitrator's award was erroneous and unduly interfered with the agency's operations, the agency could request the FLRA to stay the award, consistent with its charge to review decisions by arbitrators. Section 7122.

[17] The FLRA, as noted by the court of appeals in *National Treasury Employees Union*, has allowed for some employee input into the development of performance appraisal systems (App. B, 41a). However, the FLRA has determined that the statute does not require that this input be made through the union. While the FLRA in *Bureau of the Public Debt* held that the parties may negotiate the form of this input (App. D, 76a), the FLRA has determined, in effect, that management shall be a partner in deciding how employees, not their union, should participate. This formulation by the FLRA fails to ameliorate the injury to employees which flows from the FLRA's determination that the union has no direct role in developing measures of performance. This finding also is at odds with the fundamental principle of labor relations that a labor organization, selected as the employees' bargaining representative—not individual employees—serves as the representative of the employees in matters affecting conditions of employment. *E.g., NLRB v. Insurance Agents International Union*, 361 U.S. 477, 484-485, 47 LRRM 2705 (1960); *General Electric Co.*, 150 NLRB 192, 57 LRRM 1491 (1964). *See Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975).

basis upon which to rule a proposal nonnegotiable. Further, with regard to the FLRA's concern over an arbitrator substituting his judgment for that of an agency, Congress, by providing that disputes were subject to arbitration, section 7121, expressly has allowed for the "substitution" of an arbitrator's views for those of management. Indeed, the FLRA partially recognizes this fact by allowing for the arbitrability of disputes relating to the application of performance standards to aggrieved employees (App. C, 58a-59a). While the FLRA suggests that this somehow avoids the substitution of an arbitrator's judgment for that of an agency, the FLRA's position ignores (1) that an arbitrator, by reversing agency action upon the basis that a performance standard or critical element is improper, rejects the standard or element, thereby substituting his judgment for that of management. Moreover, the FLRA by its refusal to allow parties to grieve over performance standards and critical elements requires the parties to defer disputes over these matters until sometime after their development and application to employees. This prevents the early correction of an improper standard or element, thereby allowing injury generally to employees represented by the union. Arbitral, administrative, and judicial resources, never mind common sense, require a more expeditious and rational means for minimizing injury to employees and achieving resolution of disputes.

4. The interpretation given section 7106 by the FLRA and the court of appeals in this case is central to the scope of negotiation between labor and management in the federal sector. Since wages, hours, many benefits and other matters of concern to employees, which, traditionally, are established by collective bargaining, are set by Congress, the scope of collective bargaining and, conversely, the reach of management rights under section 7106 becomes all the more critical to employees and unions in the federal sector. If this Court decides to grant certiorari in this case, the Court will have the op-

portunity to provide crucial guidance as to how the section 7106 rights of labor and management should be harmonized, and to foster the emergence of collective bargaining in the federal sector, as originally intended by Congress in enacting the statute.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1968,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1274

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1968,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

Petition for Review of an Order of the Federal Labor Relations Authority

---

Argued December 4, 1981

Decided October 12, 1982

William J. Stone, with whom *James R. Rosa* was on the brief, for petitioner.

Elizabeth Medaglia, Associate Solicitor, Federal Labor Relations Authority, with whom *Marian R. Fox*, and *Dawn D. Bennett-Alexander*, Attorneys, Federal Labor Relations Authority, were on the brief, for respondents.

Before ROBINSON, *Chief Judge*, WALD and GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* ROBINSON.

ROBINSON, *Chief Judge*: Petitioner, Local 1968 of the American Federation of Government Employees, AFL-CIO, brings on for review a decision and order of the

Federal Labor Relations Authority holding that three of petitioner's labor proposals encroach upon rights reserved to agency management by the Federal Labor-Management Relations Act,[1] and are thus not subjects of mandatory collective bargaining. In light of the principles articulated by this court in *Department of Defense* v. *FLRA*[2] and *National Treasury Employees Union* v. *FLRA*,[3] the latter issued today, we affirm the Authority's outcome.

I

The statutory and regulatory context in which this case arose is reviewed at some length in *National Treasury Employees Union*,[4] and need be only briefly recapitulated here. Under the Federal Labor-Management Relations Act, federal agencies are required to bargain with employees or their union representatives over "condition[s] of employment,"[5] but only to the extent consistent with federal law or regulations.[6] The federal law most relevant here is Section 7106(a) of the

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[1] This is the appellation commonly placed on Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1192, 5 U.S.C. §§ 7101 *et seq.* (Supp. IV 1980).

[2] 212 U.S.App.D.C. 256, 659 F.2d 1140 (1981).

[3] No. 80-1895 (D.C. Cir. Oct. 12, 1982).

[4] *Id.* at 2-7.

[5] 5 U.S.C. § 7114(a)(5)(b) (Supp. IV 1980). "Conditions of employment" are defined, with exceptions not pertinent here, as "personnel policies, practices, and matters, whether established by rule, regulation or otherwise, affecting working conditions." *Id.* § 7103(a)(14).

[6] *Id.* § 7117(a)(1), stating that "the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation."

Act, which reserves to management the right to "direct employees" [7] and "assign work." [8] The Act also instructs federal agencies to establish employee-performance appraisal systems,[9] the key components of which are "performance standards" for and "critical elements" of the job.[10]

During collective bargaining between petitioner and the Department of the Treasury, a dispute arose over the negotiability of certain of petitioner's proposals regarding the Department's development of a performance-appraisal system. The Department concluded that the italicized portions of the following proposals were nonnegotiable:

PROPOSAL 1

Section 1. The parties agree that critical elements of a position used for performance appraisal will be

---

[7] *Id.* § 7106(a)(2)(A), quoted *infra* note 37.

[8] *Id.* § 7106(a)(2)(B), quoted *infra* note 37.

[9] *Id.* § 4302(b)(1), providing that

> [u]nder regulations which the Office of Personnel Management shall prescribe, each performance appraisal shall provide for—
>
> (1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria . . . related to the job in question for each employee or position under the system.

These appraisals are to be used in rewarding, promoting, reducing in grade, retaining and removing employees. *Id.* § 4302(a)(3).

[10] See 5 C.F.R. 430.202(d), (e) (1982); *National Treasury Employees Union* v. *FLRA*, *supra* note 3, at 5-6. A performance standard is the "expressed measure of the level of achievement established by management for the duties and responsibilities of a position [and may include] . . . elements such as quantity, quality, and timeliness." 5 C.F.R. 430.202(d) (1982). A critical element is a "component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action. . . ." *Id.* § 430.202(e).

based only on the grade controlling factors of a position for which there will be an accurate position or job description. *Such critical elements for performance appraisals will be weighted in direct proportion to the relative importance in grade determination. . . .*[11]

PROPOSAL III

Section 4. There shall be no secret studies bearing on performance appraisals. All studies conducted by the [employer] will be conducted on typical workers under normal working conditions. *The Union shall participate on an equal basis in the development or revisions of all measures of performance and studies including but not limited to selection of typical workers and conditions. If agreement cannot be reached, formal negotiations will be convened. Any impasses will be referred to the Federal Service Impasses Panel for resolution.*

PROPOSAL IV

Section 6. Any disputes under this Article may be resolved under the negotiated grievance procedure including but not limited to:

---

[11] Petitioner also submitted a Proposal II, which specified:

> Section 3. Employees' annual performance rating will be the result of the application of standards of performance to the appropriate critical elements of a position established in accordance with [Proposal I].

The Department, citing § 7106(a), refused to bargain over this proposition as well, and on review the Authority found it unbargainable insofar as it referenced Proposal I, a decision also questioned here by petitioner. Since the negotiability of this proposal is coextensive with that of Proposal I, it need not be discussed separately, for our conclusions on Proposal I apply equally to Proposal II.

1. *Challenges to critical elements of position.*

2. *The measure of performance as set forth in performance standards.*[12]

As was its privilege under the Act,[13] petitioner obtained administrative review by the Federal Labor Relations Authority of the Department's determinations. The Authority ruled that the disputed portions of the proposals invaded areas confided to management by Section 7106(a),[14] and thus were outside the agency's statutorily-imposed duty to bargain.[15] In so concluding, the Authority relied upon an earlier holding [16] which we today sustain,[17] that establishment of performance standards and identification of critical job elements, as parts of an employee-performance appraisal system, are components of management's power, reserved by Section 7106(a), to direct employees and assign work, and as such are beyond the ambit of mandatory collective bargaining.[18] Applying that principle to this case, the Authority condemned each of the proposals in issue to the same fate.[19]

---

[12] The Department also contended for nonnegotiability of a portion of Proposal IV, stipulating that "any disputed action taken as a result of a performance appraisal will be treated as any other disciplinary matter" under the negotiated grievance procedure. The Authority, however, held that the Department was obligated to engage in collective bargaining over this provision. See *American Fed'n of Gov't Employees, Local 1538*, 5 F.L.R.A. No. 14 at 8-9 (Feb. 9, 1981), [hereinafter cited as *AFGE, Local 1968*]. The Department has not sought review of this ruling.

[13] See 5 U.S.C. § 7117(c)(1) (Supp. IV 1980).

[14] *Id.* § 7106(a).

[15] *AFGE Local 1968, supra* note 12.

[16] *National Treasury Employees Union*, 3 F.L.R.A. 769 (1980) [hereinafter cited as *NTEU*].

[17] *National Treasury Employees Union* v. *FLRA, supra* note 3.

[18] *NTEU, supra* note 16, 3 F.L.R.A. at 770.

[19] *AFGE Local 1968, supra* note 12, at 2, 7, 8-9.

In restricting "critical elements of a position" for performance-appraisal purposes to those deemed grade-controlling,[20] the Authority reasoned, Proposal I limited the agency's ability to itself select critical job elements, for it could not treat as critical an element not otherwise considered grade-controlling.[21] In this respect, Proposal I, the Authority said, was materially different from one it had upheld earlier,[22] which in the Authority's words had merely prescribed "general, non-quantitative criteria under which an arbitrator could review [the] application to an employee of a performance standard established by agency management." [23] In contrast, Proposal I, the Authority declared, established a substantive criterion—classification as grade-controlling—in obedience to which critical job elements must be designated.[24] The Authority thus concluded that this proposal directly interfered with management's reserved authority under Section 7106(a) to direct employees and assign work through use of critical job elements identified by management alone.[25]

Continuing, the Authority ruled that Proposal III, which envisoned equal union participation in development and revision of measures of performance, and called for formal negotiations on related disputes and possible resort to the Federal Service Impasses Panel,[26] was in-

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[20] See text *supra* at note 11 (text of proposal).

[21] *AFGE Local 1968, supra* note 12, at 2.

[22] *Id.* at 3; see *American Fed'n of Gov't Employees, Local 32,* 3 F.L.R.A. 783 (1980) [hereinafter cited as *AFGE Local 32*].

[23] *AFGE Local 1968, supra* note 12, at 3.

[24] *Id.*

[25] *Id.* at 3.

[26] See text *supra* at note 11 (text of proposal). When authorized negotiations reach an impasse, either party may take the dispute to the Federal Service Impasses Panel, see 5 U.S.C. § 7119(b)(1),

consistent with management's rights.[27] Because this proposal would require bargaining to impasse on questions concerning the particular performance standards to be adopted, the Authority deemed it indistinguishable from that condemned in *National Treasury Employees Union*.[28] On the basis of that earlier holding, Proposal III was held to be outside the duty to bargain.[29]

Lastly, the Authority repulsed the petitioner's attack on Proposal IV, which would make grievance procedures applicable to disagreements growing out of the establishment and operation of performance-appraisal systems.[30] Stating that a negotiated grievance procedure may not properly extend to any matter reserved by law to agency discretion, the Authority held that this proposal would effectively subject the agency's exercise of its exclusive right to direct the employees and assign work to review by an arbitrator,[31] and therefore would empower arbitrators to nullify management's judgment on performance standards and critical job elements and to substitute their own.[32] The Authority spurned the suggestion that the proposal dealt merely with procedural matters, and as such was not shielded from negotiation,[33] and concluded that it trespassed upon the agency's re-

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which is empowered to take any necessary action to resolve it, *id.* § 7119(c)(5)(B)(iii), including binding arbitration and imposed settlement. See *Department of Defense* v. *FLRA*, *supra* note 2, 212 U.S.App.D.C. at 264, 659 F.2d at 1148.

[27] *AFGE Local 1968*, *supra* note 12, at 7-8.

[28] *Id.* at 8; see note 73 *infra* (text of *NTEU* proposal); notes 42-43 *infra* and accompanying text (discussing *NTEU*).

[29] *AFGE Local 1968*, *supra* note 12, at 8.

[30] See text *supra* at note 12 (text of proposal).

[31] *AFGE Local 1968*, *supra* note 12, at 10-11.

[32] *Id.* at 11.

[33] *Id.* at 10; see notes 60-65 *infra* and accompanying text (discussing negotiability of procedures under the Act).

served right to establish performance standards and identify critical job elements, and accordingly was outside the scope of the bargaining obligation.[34]

II

Petitioner complains of the Authority's ruling on a number of grounds, many of which are effectively disposed of by *Department of Defense*,[35] which was rendered after filing of petitioner's principal brief herein, and *National Treasury Employees Union*,[36] which we announce contemporaneously with this opinion.

A. *Interpretation of the Act.*

Petitioner's main challenge is to the Authority's holding that promulgation of performance standards and identification of critical job elements are ingredients of the right reserved to management by Section 7106(a) of the Federal Labor-Management Relations Act to direct employees and assign work,[37] and thus are nonnegotiable. The Act, petitioner says, embodies a congressional determination that collective bargaining in the federal sector is in the public interest, and therefore is to be encour-

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[34] *AFGE Local 1968*, *supra* note 11, at 10-11.

[35] *Supra* note 2.

[36] *Supra* note 3.

[37] 5 U.S.C. § 7106(a)(2)(A), (B) (Supp. IV 1980), providing that:

> Nothing in this chapter shall affect the authority of any management official of any agency—
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> * * * *
>
> (2) in accordance with applicable laws—
>
> (A) to hire, assign, direct, lay off, and retain employees in the agency . . .;
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted.

aged.[38] Toward this end, petitioner continues, the Act imposes an obligation upon federal agencies to engage in collective bargaining [39] over "conditions of employment," [40] a term petitioner would have us define as including performance standards and critical job elements incorporated into a performance-appraisal system.[41]

We reject this argument for the reasons articulated in *National Treasury Employees Union*.[42] There we today affirm the Authority's determination that formulation of performance standards and designation of critical job elements for performance-appraisal purposes are within the agency's statutorily-reserved prerogative to direct employees and assign work, and therefore fall outside the obligation to bargain.[43] That holding obviously brings to naught a good many of the arguments advanced by petitioner.

Pressing a point not raised there, however, petitioner contends that Congress contemplated that performance standards would be subject to collective bargaining. In support, petitioner cites a statement by Representative Udall [44]

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[38] Brief for Petitioner at 21-22, citing 5 U.S.C. § 7101 (Supp. IV 1980).

[39] See 5 U.S.C. § 7114(a)(4) (Supp. IV 1980). Collective bargaining is there defined as "a good-faith effort to reach agreement with respect to the conditions of employment affecting . . . employees." *Id.*

[40] See *id.* § 7103(a)(12); see also *id.* § 7103(a)(14) (collective bargaining defined).

[41] Brief for Petitioner at 22-24.

[42] *Supra* note 3.

[43] *National Treasury Employees Union* v. *FLRA*, *supra* note 3, at 18-26.

[44] Representative Udall was the principal author of Title VII of the Civil Service Reform Act of 1978—the legislation this case implicates. See note 1 *supra*. See 124 Cong. Rec. 29174 (1978) (remarks of Representative Udall), *reprinted in* Subcommittee on Postal Personnel and Modernization of the Committee on Post

during the House debates that Section 7106(a)(2)(c)[45] is designed

> to preserve as bargainable (to the extent permitted by applicable laws and regulations) the standards, criteria, and procedures for establishing promotion certificates, while assuring management's right to make the actual selection from the certificate. . . .[46]

Promotion-certificate standards and criteria, it is argued, are not materially distinct from performance standards; by analogy, Congress is said to have anticipated negotiation of the latter.[47] To this the Authority did not respond directly in its decision[48] but instead relied upon a prior agency precedent declaring that there is no "direct connection between the standards for establishing promotion certificates and performance standards."[49]

The term "promotion certificate" is not currently employed in the pertinent chapter of the Federal Personnel Manual,[50] suggesting that perhaps it is no longer a formal promotion mechanism. As used in sections of the Manual in effect when Representative Udall spoke, however, "promotion certificate" denoted a means by which highly or relatively more qualified applicants were selected from a pool and certified to personnel officials.[51]

Office and Civil Service, 96 Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 907 (1979) [hereinafter cited as *Legislative History*].

[45] 5 U.S.C. § 7106(a)(2)(c) (Supp. IV 1980).

[46] 124 Cong. Rec. 29174 (1978) (remarks of Representative Udall), reprinted in *Legislative History*, *supra* note 44, at 925.

[47] Brief for Petitioner at 29-30.

[48] *AFGE Local 1968*, *supra* note 12, at 3.

[49] *NTEU*, *supra* note 16, 3 F.L.R.A. at 778.

[50] See Federal Personnel Manual, ch. 335, subch. 1.

[51] *Id.*, ch. 335, subch. 3-7 (superseded); see also *Mallard* v. *Claytor*, 471 F.Supp. 16, 20 (D.D.C. 1978); *Canty* v. *Olivarez*,

Performance appraisals were a factor to be considered in evaluating candidates for listing in a promotion certificate,[52] but the standards for such a listing clearly were not synonymous with those for measuring job-performance. For a given individual, the former might vary considerably with the job to which promotion was sought, while the latter remain constant with the position occupied. The Authority's conclusion that there is no "direct connection" thus is sound.

Moreover, the Udall statement reflects an intention to preserve as bargainable merely that which was so designated in the promotion certificate scheme.[53] The relevant portions of the Federal Personnel Manual indicated that employees and their organizational representatives were to participate in the development of promotion plans and guidelines,[54] but the participation envisioned was limited in several important respects. The Manual provided that employee consultation and negotiation did not extend to qualification standards or evaluation methods, or to the exercise of rights reserved to management by executive order, including assignment of duties to employees.[55]

It is clear, even from this brief review, that the scope of permissible bargaining over promotion certificates was not nearly so broad as petitioner would have us believe. Representative Udall sought to maintain bargainability

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452 F.Supp. 762, 766-767 (N.D. Ga. 1978); *Melick* v. *EEOC*, 410 F.Supp. 736, 737 & n.2 (W.D. Pa. 1976).

[52] Federal Personnel Manual, ch. 335, subch. 3-6d (superseded). Performance appraisals have continuing relevance in promotion decisions in the federal sector. See *id.* ch. 335, subch. 1-4, Requirement 3.

[53] See text *supra* at note 46.

[54] Federal Personnel Manual, ch. 335, subch. 5-1 (superseded) (participation of employee organizations and employees in development and revision of promotion guidelines and plans).

[55] *Id.*, ch. 335, subch. 5-1 d(2), (3) (superseded).

of the criteria applicable to promotion certificates to the extent that it was permitted under then-current laws and regulations, and pertinent regulations precluded negotiation over promotion-qualification standards and job-duty assignment. So, notwithstanding some similarity between promotion certificates and performance appraisals, petitioner's argument must fail. We discern nothing in this portion of the legislative history manifesting a congressional intent to impart negotiability to performance standards in the performance-appraisal context.

Petitioner also contends that the proposals in issue would do no more than furnish procedures to be utilized when employees are evaluated,[56] and thus are made bargainable by Section 7106(b)(2),[57] providing that "[n]othing in [the management rights] section shall preclude any agency and any labor organization from negotiating . . . procedures which management officials of the agency will observe in exercising any authority under this section." Petitioner argues that "procedures" must be defined, in accordance with its plain meaning, as encompassing only "a particular course of action [or] . . . way of going . . . about the accomplishment of something," or a "series of steps," [58] and that each of its proposals constitutes a mere step in the ultimate assessment on an employee's performance.[59]

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[56] Brief for Petitioner at 24-29.

[57] 5 U.S.C. § 7106(b)(2) (Supp. IV 1980).

[58] Brief for Petitioner at 25-26, quoting Webster's Third New Int'l Dictionary (unabridged) (1968).

[59] Proposal I, it is said, merely furnishes a " 'particular way of . . . going about the accomplishment of [setting critical elements].' " Brief for Petitioner at 25. Proposal III is similarly said to set forth a " 'particular way of . . . going about the accomplishment of [setting measures of performance]' and a 'particular step adopted for . . . accomplishing [that result].' " *Id.* at 26. Finally, Proposal IV is characterized as a "particular step" in the performance-appraisal process and a "check to see that '[the] series of steps have been followed in a regular, orderly definite way.' " *Id.*

The distinction between negotiable procedures and non-negotiable substantive exercises of management authority was discussed at some length in *Department of Defense.*[60] There we recognized that demarcation of substance and procedure "involves questions of judgment and balance, about which reasonable people could easily differ," and was a task best performed by the Authority itself.[61] We also suggested the importance of drawing the line between proposals involving purely procedural steps and proposals "cast in procedural language [which] impinge upon substantive management decisions." [62] The former are removed from the collective bargaining process only to the extent to which they preclude management from "acting at all," [63] while the latter are similarly immune if their implementation would "directly interfere" with the agency's exercise of rights reserved by Section 7106(a).[64]

The construction of § 7106(b) petitioner advances here is, in our view, unduly literal and completely unsupportable. Initially, we reject outright petitioner's characterization of Proposal I, restricting critical job elements to grade-controlling factors, as procedural. The only possible basis for that interpretation is the claim, pressed by petitioner during the administrative proceedings,[65] that standards of any sort are inherently procedural, a position we believe to be untenable. Indeed, acceptance of that thesis would eviscerate all of the management rights that Section 7106(a) is designed to protect.

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[60] *Supra* note 2.

[61] 212 U.S.App.D.C. at 277, 659 F.2d at 1161.

[62] *Id.* at 268, 659 F.2d at 1152.

[63] *Id.* at 270, 659 F.2d at 1154.

[64] *Id.* at 275, 659 F.2d at 1159.

[65] See Response of Exclusive Representative to Agency Statement of Negotiability—Part I: Arguments on Performance Standards, Critical Elements and Specific Proposals, at 3-9 (Jan. 9, 1980), *AFGE Local 1968, supra* note 12.

Petitioner's two remaining proposals can, at best, be described as propositions cloaked in procedural garb which encroach upon management's substantive authority.[66] As such they are not subject to collective bargaining to the extent that they would directly interfere with management rights,[67] and the Authority's conclusion that their implementation would do so is manifestly clear from its decision.[68] Proposal III would give petitioner an equal voice in development of performance measures, and would require negotiation in the event of disagreement and reference of any impasse to an independent body.[69] Proposal IV would open the door to arbitral review and awards setting performance standards and selecting critical job elements at variance with those designated by management upon its own assessment of agency priorities.[70] We thus perceive no basis for upsetting the Authority on these aspects of the litigation.

B. *Application of the Act.*

Finally, petitioner challenges the Authority's determination that the proposals at issue do in fact impinge upon management's reserved right to direct employees and assign work. Even granting that performance standards and critical job elements ordinarily are nonnegotiable on that account, petitioner argues, it cannot be said that these proposals would embarrass management's exercise of those rights.[71] Petitioner insists that the proposals here are materially different from those found

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[66] The Authority specifically rejected petitioner's "procedural" characterization of Proposal IV. See *AFGE Local 1968*, *supra* note 12, at 10; note 33 *supra* and accompanying text.

[67] See text at notes 62-64 *supra*.

[68] See *AFGE Local 1968*, *supra* note 12, at 3, 8, 9-11.

[69] See text *supra* at notes 26-29.

[70] See text *supra* at notes 30-32.

[71] Brief for Petitioner at 33-57.

nonnegotiable by the Authority in *National Treasury Employees Union*,[72] which specified exactly the performance standards and critical job elements the union wanted the agency to adopt,[73] and consequently that a different result on negotiability is warranted.

There is undeniably some difference between the proposals in the case at bar and those presented in *National Treasury Employees Union*. But, contrary to petitioner's assertion, the variation is not significant to a decision on bargainability.[74] As petitioner admitted before the Authority,[75] as the Authority duly noted in its decision and as is evident to us,[76] Proposal I restricts the agency's choice of critical job elements to those factors which are grade-controlling. Its effect, therefore, is indistinguishable from that wrought by the proposals involved in *National Treasury Employees Union*: imposition of a limitation upon management's ability to identify and select those elements.[77] Proposal III, requiring as it does formal negotiations on measures of performance and further requiring referral of hopelessly-mired disputes to

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[72] *Supra* note 3.

[73] The proposal challenged in *National Treasury Employees Union* provided that "to retain his-her position, incumbent must process 9.0 batches per hour." See *National Treasury Employees Union* v. *FLRA*, *supra* note 3, at 8.

[74] Indeed, in its brief in this court petitioner conceded that in many respects the difference between these proposals and those advanced in *National Treasury Employees Union* was merely one of degree. See Brief for Petitioner at 38.

[75] See Response of Exclusive Representative to Agency Statement of Negotiability—Part I: Arguments on Performance Standards, Critical Elements, and Specific Proposals, at 14 (Jan. 9, 1980), *AFGE Local 1968*, *supra* note 12.

[76] *AFGE Local 1968*, *supra* note 12, at 2.

[77] See *National Treasury Employees Union* v. *FLRA*, *supra* note 3, at 18-26.

the Federal Services Impasses Panel,[78] would similarly restrict management's authority in that area by insisting that it be exercised only with union approval. Since management's ability to establish performance standards and critical job elements is part and parcel of its exclusive right to assign employees and direct work, the Authority cannot be said to have acted arbitrarily or capriciously in deeming these proposals nonnegotiable.

Petitioner also quarrels with the Authority's outcome on Proposal IV, again pointing to an earlier ruling of the Authority for support. Proposal IV, petitioner contends, is comparable to the one found negotiable by the Authority in *AFGE Local 32*,[79] which provided that "all performance standards will be fair and equitable and consistent with the classification standards for the job," and that "an employee who believes a standard does not meet the above criteria may grieve" the question.[80] The Authority's determination that Proposal IV is nonbargainable, petitioner says, amounts to an unexplained reversal of its decision in *Local 32*.[81]

We find this argument unacceptable. The proposal in *AFGE Local 32*, in the Authority's words, merely "established a general non-quantitative requirement by which the application of critical elements and performance standards established by agency management could subsequently be evaluated. . . ." [82] Proposal IV, in stark contrast, would sanction direct challenges to performance standards and critical job elements, and would allow arbitrators to substitute their notions of proper standards and elements for those of management. Given this dif-

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[78] See text *supra* at notes 26-29.

[79] *Supra* note 22.

[80] 3 F.L.R.A. at 790.

[81] Brief for Petitioner at 45-47.

[82] *AFGE Local 1968, supra* note 12, at 3.

ference in the respective proposals' effects, it simply cannot be said that the Authority's treatment of Proposal IV is a departure from the principle espoused in *AFGE Local 32*.

Petitioner additionally urges that the Authority's ruling that Proposal IV was not subject to bargaining is premised on an unarticulated and therefore unsustainable distinction between challenges to performance standards and critical job elements advanced at the time of their adoption, and those made after such standards and elements have been applied to a particular employee.[83] Proposal IV was found nonnegotiable, petitioner contends, because, unlike those in *AFGE Local 32*, it would permit arbitration at the time performance standards and critical elements are established.[84] We agree unhesitatingly with petitioner that an administrative agency must articulate the reasons for its decision, and that those reasons alone provide the basis for judicial assessments of its validity.[85] As we read the decision attacked here, however, there is nothing to indicate the Authority's reliance on the distinction suggested;[86] rather, petitioner

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[83] Brief for Petitioner at 48.

[84] *Id.*

[85] See *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270, 80 S.Ct. 1122, 1126-1127, 4 L.Ed.2d 1208, 1213 (1960); *Ashland Exploration, Inc.* v. *FERC*, 203 U.S.App.D.C. 235, 240 n.24, 631 F.2d 817, 822 n.24 (1980); *Public Media Center* v. *FCC*, 190 U.S.App.D.C. 425, 435, 587 F.2d 1322, 1332 (1979).

[86] To the extent that the Act preserves as bargainable "arrangements for employees adversely affected by the exercise of any [reserved] authority" by management, see 5 U.S.C. § 7106(b)(3) (Supp. IV 1980), it does contemplate a temporal distinction of sorts —an employee is affected only after management action, hardly before. It was on this basis that the Authority found so much of Proposal IV as provided for the grievance of "any [disputed] action taken as a result of a performance appraisal" a proper subject of collective bargaining. *AFGE Local 1968, supra* note 12, at 11-12; see note 12 *supra*. Petitioner however, has not invoked this provision in connection with the claim here discussed.

seems to be engaging in a guessing-game. The Authority ruled that the disputed portions of Proposal IV were non-negotiable because they paved the way for substantial interference with management's statutorily-reserved power to direct employees and assign work by licensing arbitral awards that could substitute performance standards and critical job elements different from those previously adopted by management.[87] The timing of this substitution, be it when management first institutes the standards or after they are applied through a performance appraisal, is wholly immaterial.[88]

For these reasons, we find petitioner's challenges to the Authority's decision unpersuasive, and the order under review is accordingly

Affirmed.

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[87] See *AFGE Local 1968*, *supra* note 12, at 10-11.

[88] Petitioner also contends that in finding these propositions non-negotiable, the Authority has intruded into their merits and thereby has usurped the role of the Federal Service Impasses Panel. Brief for Petitioner at 58-60. Petitioner argues that the Authority has overlooked the nature of the union proposals as no more than proposals, and thereby has lost sight of the fact that a holding that they are negotiable would merely require bargaining, not adoption. *Id.* This, petitioner insists, amounts to an improper examination by the Authority of the merits of the proposals, a task delegated to the Impasses Panel. Taken to the next logical step, petitioner's definition of "merits" would dictate the conclusion that because any given employee proposal is simply a proposal, not yet a command to management, it is a proper subject of mandatory bargaining between employees and management. That result clearly is not contemplated by the statutory scheme.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1895

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

Petition for Review of an Order of the Federal Labor Relations Authority

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Argued September 18, 1981

Decided October 12, 1982

Robert M. Tobias for petitioner. *William E. Persina* also entered an appearance for petitioner.

Elizabeth Medaglia, Associate Solicitor, Federal Labor Relations Authority, with whom *Marian R. Fox*, Attorney, Federal Labor Relations Authority, was on the brief for respondent.

Before ROBINSON, *Chief Judge*, GINSBURG, *Circuit Judge*, MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* ROBINSON.

ROBINSON, *Chief Judge*: This petition launches judicial review of a decision and order of the Federal Labor Relations Authority holding that the promulgation of

performance standards for federal civil service employees and the identification of the critical elements of their jobs are included in the package of rights reserved to management officials of federal agencies by Title VII of the Civil Service Reform Act of 1978,[1] commonly known as the Federal Labor-Management Relations Act,[2] and consequently do not fall within the duty to bargain imposed by that legislation. Our careful examination of the Act and its relevant legislative history leads us to conclude that this interpretation must stand. Accordingly, we affirm the Authority's action.

I. Statutory and Regulatory Framework

Petitioner, National Treasury Employees Union, is the exclusive representative of the employees in the bargaining unit of the Treasury Department's Bureau of Public Debt.[3] All of these employees are covered by the Federal Labor-Management Relations Act. Passed in 1978 in an effort to comprehensively remodel the federal civil service system, the Act restructured labor-management relations in the Federal Government. In adopting the Act, Congress sought to strengthen federal management's control over hiring and firing of employees, and simultaneously to buttress the status of employee unions in the federal sector.[4] In recognition of these goals, the Act declares that the public interest is served both by higher standards of employee performance and by collective bargaining in the civil service.[5]

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[1] Pub. L. No. 95-454, tit. VII, 92 Stat. 1191 (1978), 5 U.S.C. §§ 7101 *et seq.* (Supp. IV 1980) [hereinafter cited as codified].

[2] Likewise, we refer to Title VII by that appellation.

[3] Brief for Petitioner at 2; see 5 U.S.C. § 7111 (Supp. IV 1980). The Bureau is responsible generally for the issuance of government securities to the public. Brief for Petitioner at 2.

[4] See Part III(B) *infra*.

[5] 5 U.S.C. § 7101(a) (Supp. IV 1980), providing:

Congress finds that—

Federal employers are expressly required by the Act to engage in collective bargaining,[6] defined as a "good faith effort to reach agreement with respect to the conditions of employment." [7] The statutory phrase "conditions of employment" is in turn defined as "[p]ersonnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." [8] By equally positive terms of the Act, however, the duty to bargain does not extend to proposals inconsistent with federal law or some government-wide rule or regulation.[9] In this context, Section 7106(a) of the

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(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interests,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

[6] *Id.* § 7114(a)(4). An agency and the exclusive bargaining representative of its employees must "meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement." *Id.*

[7] *Id.* § 7103(a)(12).

[8] *Id.* § 7103(a)(14).

[9] *Id.* § 7117(a)(1), providing that "the duty to bargain in good faith shall, to the extent not inconsistent with any Federal Law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation." *Id.*

Act [10] reserves specific rights to management, providing pertinently for this case that

> [n]othing in [the Act] shall affect the authority of any management official of any agency . . .
>
> (A) to hire, assign, direct, lay off, and retain employees . . .
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted.

Thus, a proposal calling for negotiation over exercise of one or more of the management rights enumerated in Section 7106(a) [11] clashes with federal law, and it is not within the employing agency's duty to bargain.

The Act is administered by the Federal Labor Relations Authority,[12] an independent bipartisan agency within the Executive Branch which succeeded the Federal Labor Relations Council.[13] The Authority's role in federal employment is analogous to that of the National Labor Relations Board [14] in the private sector.[15] Under its

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[10] *Id.* § 7106(a).

[11] As we shall see, the right implicated vitally in this litigation is to "direct . . . employees" and "assign work."

[12] The Authority came into being in 1978. See Part III(B) *infra*. It now serves, among other capacities, as a central policymaking body for labor-management relations in the federal service. See 5 U.S.C. § 7105 (Supp. IV 1980). The Authority consists of three full-time members appointed by the President with the advice and consent of the Senate. *Id.* § 7104.

[13] The Council was created by Executive Order 11491, originally issued in 1969, to exercise administrative authority over the then-existent labor-management relations program for federal employees. 3 C.F.R. 861 (1966-1970 Compilation), *reprinted at* 5 U.S.C. § 7101 note (Supp. IV 1980).

[14] See 29 U.S.C. §§ 151 *et seq.* (1976).

[15] See *Department of Defense* v. *FLRA*, 212 U.S.App.D.C. 256, 260, 659 F.2d 1140, 1144 (1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982).

statutory mandate, the Authority must determine units appropriate for union organization and bargaining,[16] conduct representation elections,[17] adjudicate unfair labor practice complaints,[18] and resolve negotiability disputes.[19]

As part of its comprehensive effort to reform the civil service, Congress also revised the methodology for appraising employee performance. That process, as reconstructed, seeks to assure accurate evaluations of job performance through use of objective criteria.[20] Each agency must develop one or more performance-appraisal systems,[21] and these systems must, in turn, provide for establishment of objective and job-related performance standards tied to the demands of the employee's position.[22] The agency is directed to communicate both the standards and the critical elements of the position to the employee.[23] The results of the required performance ap-

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[16] 5 U.S.C. § 7105(a)(2)(A) (Supp. IV 1980).

[17] *Id.* § 7105(a)(2)(B).

[18] *Id.* § 7105(a)(2)(G).

[19] *Id.* § 7117(c)(1). The Authority has promulgated regulations setting forth the appeal procedures to be utilized in such disputes. See 5 C.F.R. § 2424 (1980). The power to convene a hearing prior to resolving the issues is granted to the Authority by statute. See 5 U.S.C. § 7117(b) (Supp. IV 1980).

[20] *Id.* § 4302(b)(1).

[21] *Id.*

[22] *Id.*, specifying:

> Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—
>
> (1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system.

[23] *Id.* § 4302(b)(2).

praisals are to be used as the basis for rewarding and promoting employees, reducing them in grade, and retaining or removing them.[24]

Quite obviously, the concepts of "performance standards" and "critical elements" of a position are key features of the performance-appraisal systems. As defined by the Office of Personnel Management, a performance standard is the "express measure of the level of achievement by management for the duties . . . of a position." [25] Similarly, a critical element is a "component of an employee's job that is of sufficient importance that performance below the minimum standards . . . requires remedial action and denial of within grade increases, and may be the basis for removing or reducing the level of that employee." [26] The potential importance of these aspects of performance-appraisal systems is reflected by the specific statutory requirement that agencies encourage employee participation in the development of performance standards.[27]

II. Factual Background of the Litigation

Pursuant to the latter directive, the Bureau of Public Debt informed petitioner in February of 1979 that it planned to institute new standards of performance for the Bureau's accounts maintenance clerks.[28] Petitioner re-

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[24] *Id.* § 4302(a)(3).

[25] 5 C.F.R. § 430.202(d) (1982).

[26] *Id.* § 430.202(e).

[27] "Each agency shall develop one or more performance appraisal systems which . . . shall encourage employee participation in establishing performance standards." 5 U.S.C. § 4302(a)(2) (Supp. IV 1980).

[28] Statement of Position on Behalf of the Bureau of Public Debt, FLRA No. 0-ng-56 (June 25, 1979) at 3, Petitioner's Appendix (App.) 11. A proposed standard would substitute fixed performance levels for an existing floating standard of 85% of the group average

quested negotiations over the substance, impact and implementation of changes.[29] The Bureau took the position that it would negotiate the impact and implementation of the proposals, but not the substance of any standard.[30]

Ultimately, petitioner submitted the following proposal:

> Accounts Maintenance Clerks (GS 520-3/5) must maintain the following minimum rates:
>
> 1. To retain his/her position, encumbent must process 9.0 batches per hour.[31]

As part of the Bureau's performance-appraisal system, this proposal would have identified batch-processing as a critical element of an accounts maintenance clerk's position, and would have fixed nine batches per hour as the minimum performance acceptable for those in that position.[32] The Bureau felt that this proposal usurped non-

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performance. *Id.* at 2, App. 10. In its brief before the Authority, the Bureau explained that this change in the production standard would respond to a decision of the Federal Employee Appeals Authority indicating that the Bureau's floating standard was improper because neither fair nor objective. *Id.*; see Federal Employee Appeals Authority, Dec. No. DA531170003 (June 8, 1978). As ultimately implemented by the Bureau, the standard sets performance levels of 9.5 batches per hour for job retention, and 10.0 batches per hour for a within grade increase. Brief for Petitioner at 3.

[29] Statement of Position on Behalf of the Bureau of Public Debt, *supra* note 28, at 3, App. 11.

[30] *Id.*

[31] *National Treasury Employees Union*, 3 F.L.R.A. 769 (1980) [hereinafter cited as *NTEU*]. Petitioner's proposal also provided that an incumbent must process 9.0 batches per hour in order to be eligible for a within-grade step increase. *Id.* The Authority held that this suggestion was inconsistent with 5 C.F.R. § 531.407(c)(1) (1982) because it set the same standard of performance for both within-grade step increases and job retention, and that in any event it was not a proper subject of negotiation. *Id.* at 782. Petitioner has not contested that determination on this appeal.

[32] Brief for Respondent at 12. Petitioner has not disputed this characterization of its proposal.

negotiable prerogatives of management, and refused to bargain;[33] and, as was its statutory right,[34] petitioner filed a negotiability appeal with the Authority.[35] The appeal was consolidated with sixteen others for purposes of oral argument on the question whether and to what extent performance-appraisal systems, and performance standards they include, are bargainable under the Act.[36]

In its decision in the instant case, the Authority concluded that establishment of performance standards and identification of critical job elements are within the scope of the power reserved exclusively to management by Section 7106(a) to "direct employees" and "assign work."[37] The Authority further held that petitioner's proposal directly interfered with those functions, and therefore was not a proper subject of negotiation because inconsistent with federal law.[38] It is this determination that petitioner now challenges. The principal issue presented for resolution, then, is whether management's statutorily-reserved right to direct employees and assign work properly encompasses formulation of performance standards and ascertainment of critical job elements in discharge of

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[33] Memorandum from William R. Kansier, Supervisory Labor Relations Specialist, to James Sober, Assistant Counsel, National Treasury Employees Union (Apr. 18, 1979), attachment to Negotiability Appeal (Apr. 26, 1979), App. 3. This memorandum argued nonnegotiability on the ground that the proposal was intricately related to staffing patterns, and thus affected management's right to assign work, assign and retain employees, and intruded upon agency efficiency and effectiveness. *Id.*

[34] See 5 U.S.C. § 7117(c) (Supp. IV 1980).

[35] See Negotiability Appeal, *supra* note 33.

[36] Notice of Hearing, FLRA case No. 0-ng-56 (Feb. 4, 1980), App. 82.

[37] *NTEU*, *supra* note 31, 3 F.L.R.A. at 775-776; see notes 79-82 *infra* and accompanying text.

[38] 3 F.L.R.A. at 778.

an agency's responsibility for development of an objective performance appraisal system.

In support of its decision, the Authority contends that its interpretation of the management-rights section, and the corresponding interpretation of agencies' duty to bargain, further the congressional intent manifest in the Act and its legislative history to provide federal agencies with the authority and flexibility essential to accomplishment of their respective missions.[39] The Authority asserts, as it did in the decision under review,[40] that implementation of petitioner's proposal would encumber exercise of an agency's statutory prerogative to direct employees and assign work.[41]

Petitioner argues strenuously that the obligation to bargain in good faith which the Act imposes upon federal employers[42] is to be broadly construed, and reciprocally that exceptions to that obligation are to be read narrowly.[43] Thus, petitioner urges that the management-rights exemption from the employer's duty to bargain cannot be said to encompass the development of performance-appraisal systems.[44] Petitioner further asserts that relevant Authority precedents[45] establish that before a proposal may properly be termed nonnegotiable, it must relate directly and integrally to a reserved management

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[39] Brief for Respondent at 22.

[40] *NTEU*, *supra* note 31, 3 F.L.R.A. at 778; see notes 79-88 *infra* and accompanying text (discussing *NTEU*).

[41] Brief for Respondent at 28-30.

[42] See text *supra* at notes 6-9.

[43] Brief for Petitioner at 10.

[44] *Id.* at 10, 12.

[45] See *American Fed'n of Gov't Employees, Local 3669*, 2 F.L.R.A. 641 (1980); *American Fed'n of Gov't Employees, Local 1603*, 3 F.L.R.A. 4 (1980); *International Ass'n of Firefighters, Local F. 61*, 3 F.L.R.A. 438 (1980).

right, and directly impinge upon that right.[46] Petitioner vigorously contests the Authority's view that performance standards for critical job elements are determinative of the quantity, quality or timeliness of any given employee's work.[47] That conclusion, petitioner asserts, is not supported by either evidence or logic; such standards, by petitioner's lights, have no effect until an evaluation is made *after* an employee has completed the work assigned, and thus cannot interfere with an exercise of reserved management authority.[48] Petitioner therefore says that the required relationship and impact are absent here.[49]

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[46] Brief for Petitioner at 12.

[47] *Id.* at 15.

[48] *Id.*

[49] *Id.* Petitioner also contends that Authority precedent requires an agency to introduce evidence in support of its claim that the employees' proposal infringes the implicated management right, and that the Bureau of Public Debt failed to carry this burden in the instant case. Brief for Petitioner at 13. Petitioner cites *International Ass'n of Firefighters, supra* note 45, which involved a union proposal that allegedly interfered with management's right to determine its budget. See 3 F.L.R.A. at 446; 5 U.S.C. § 7106(a)(1) (Supp. IV 1980) (nothing in Act shall affect authority of any management official of any agency to determine agency's budget). In *Firefighters*, the Authority held that when a union proposal does not explicitly establish a budgetary figure, the agency must make a substantial demonstration that the proposal would lead to an increase in costs, and that such increase would not be offset by other factors, before the proposal would be held to interfere with management's budgetary authority. 3 F.L.R.A. at 450-452, citing and quoting *American Fed'n of Gov't Employees*, 2 F.L.R.A. 604, 608 (1980). Lacking anything else on point, we can accept the cited decision as precedent only for cases in which management's right to determine its budget is involved, and not as a pronouncement of general principles governing the parties' respective burdens of proof. Moreover, evidence is hardly needed to demonstrate the effect that implementation of petitioner's proposal would have on managerial freedom to direct employees and direct work. *Firefighters* is thus inapposite, and petitioner's argument is unpersuasive.

III. Analysis and Decision

A. *Standard of Review*

We begin our consideration of the issue heedful of the appropriate standard of review. Jurisdiction to hear petitioner in this court is founded on Section 7123(c) of the Federal Labor-Management Relations Act.[50] That section provides that review of an order of the Authority shall be conducted on the record in accordance with Section 706 of the Administrative Procedure Act,[51] which, in turn, requires the reviewing court to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[52]

In determining whether the Authority's decision is vulnerable for either of these reasons, we also bear firmly in mind that courts must give considerable deference to an agency's interpretation of its enabling legislation.[53] Deference is particularly appropriate when, as here, the administrative practice in issue involves a "contemporaneous construction of a statute by the agency charged with the responsibility of setting its machinery in motion, of making the parts work efficiently, and smoothly while they are yet untried and new."[54] To sustain the agency's

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[50] 5 U.S.C. § 7123(c) (Supp. IV 1980).

[51] *Id.*

[52] *Id.* § 706(2)(A) (1976).

[53] See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434, 91 S.Ct. 849, 854-855, 28 L.Ed.2d 158, 165 (1971); *United States* v. *City of Chicago*, 400 U.S. 8, 10, 91 S.Ct. 18, 20, 27 L.Ed.2d 9, 12-13 (1970); *Zemel* v. *Rusk*, 381 U.S. 1, 11, 85 S.Ct. 1271, 1278, 14 L.Ed.2d 179, 187 (1965); *National Fed'n of Fed. Employees* v. *FLRA*, 209 U.S.App.D.C. 198, 200, 652 F.2d 191, 193 (1981).

[54] *Power Reactor Dev. Co.* v. *International Union of Elec., Radio & Mach. Workers*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed. 924, 932 (1961), quoting *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 358, 77 L.Ed. 796, 807 (1933); see *Department of Defense* v. *FLRA*, *supra* note 15, 212

application of a statutory term, "we need not find that its construction is the only reasonable one, or even that it is the result we would have reached . . . in the first instance . . . ." [55] Instead, we should adopt the agency's interpretation if it is reasonably defensible [56] and there is no compelling indication of error.[57] Mindful, then, of the necessarily deferential nature of our review, we begin our analysis of the challenged decision.

B. *Legislative History*

As is evident from the foregoing discussion, the issue posed initially by this appeal is one of statutory interpretation. In construing ambiguous terms of legislation, the intent of Congress is paramount, and this intent may appropriately be ascertained from relevant legislative history.[58] To that we now turn for such light as it may shed.

The Federal Labor-Management Relations Act traces its origin to a labor-management relations title offered

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U.S.App.D.C. at 277, 659 F.2d at 1161 (applying principle to review of FLRA action); *National Fed'n of Fed. Employees* v. *FLRA*, *supra* note 53, 209 U.S. App.D.C. at 200, 652 F.2d at 193 (same).

[55] *Department of Defense* v. *FLRA*, *supra* note 15, 212 U.S. App. D.C. at 277, 659 F.2d at 1161, quoting *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136, 145 (1946).

[56] *Department of Defense* v. *FLRA*, *supra* note 15, 212 U.S. App. D.C. at 278 n.121, 659 F.2d at 1162 n.121.

[57] *Id.* at 277, 659 F.2d at 1161; see *NLRB* v. *Hendricks County Rural Elec. Membership Club*, 454 U.S. 170, 176, 102 S.Ct. 216, 222, 70 L.Ed.2d 323, 330 (1981); *Miller* v. *Youakim*, 440 U.S. 125, 145 n.25, 99 S.Ct. 957, 969 n.25, 59 L.Ed.2d 194, 209 n.25 (1979).

[58] See, *e.g.*, *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566, 89 S.Ct. 817, 832, 22 L.Ed.2d 1, 17 (1969); *United States* v. *Donruss Co.*, 393 U.S. 297, 307, 89 S.Ct. 501, 507, 21 L.Ed.2d 495, 503 (1969); *Aviation Consumer Action Prod.* v. *Washburn*, 175 U.S.App.D.C. 273, 279, 535 F.2d 101, 106 (1976); *Cheneveuvi Tribe of Indians* v. *FPC*, 160 U.S.App.D.C. 83, 91, 489 F.2d 1207, 1215 (1973).

by Representative Udall as an amendment to substitute for its counterpart in a bill reported by the House Committee on Post Office and Civil Service.[59] As petitioner asserts,[60] Congress, in adopting that amendment, sought to expand the scope of bargaining beyond that permitted under pre-existing practice,[61] and contemplated that Section 7106(a) would accommodate that aim.[62] Represen-

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[59] 124 Cong. Rec. 29174 (1978) (remarks of Representative Udall), *reprinted in* Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 907 (1979) [hereinafter cited as *Legislative History*]. This amendment was accepted by the House, 124 Cong. Rec. 29220 (1978), reprinted in *Legislative History*, *supra*, at 965, and was later adopted by the House-Senate Conference Committee without revisions. See Joint Explanatory Statement of the Committee on Conference, H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 158 (1978), reprinted in *Legislative History*, *supra*, at 793.

[60] Brief for Petitioner at 18.

[61] A program incorporating labor-management negotiations in the federal sector was inaugurated in 1962. See, *e.g.*, Exec. Order No. 10988, 3 C.F.R. 521-528 (1959-1963 Compilation); Exec. Order No. 11491, 3 C.F.R. 861-875 (1966-1970 Compilation). The process did not receive statutory sanction until passage of the Act in 1978.

[62] See, *e.g.*, 124 Cong. Rec. 29198 (1978) (remarks of Representative W. Ford) (scope of bargaining under § 7106 to be substantially broader under Udall substitute than under Exec. Order No. 11491, its immediate predecessor), reprinted in *Legislative History*, *supra* note 59, at 954; 124 Cong. Rec. 29187 (1978) (remarks of Representative Clay) (Udall substitute embodied approach of committee that scope of collective bargaining under act would be greater than under Exec. Order No. 11491), reprinted in *Legislative History*, *supra* note 59, at 932. There were significant expressions of dissatisfaction with the Federal Labor Relation Council's interpretation of that executive order. See, *e.g.*, 124 Cong. Rec. 29198 (1978) (remarks of Representative W. Ford) ("too often the Council interpreted the management rights clause [of the executive order] so broadly as to stifle an attempt by both management and employees to address commonly recognized problems"), reprinted in *Legislative History*, *supra* note 59, at 953; 124 Cong. Rec. 29187

tative Udall indicated during House debate that, although his substitute management-rights clause was stronger than the one reported by the House Committee, "it is still to be treated as an exception to the general obligation to bargain over conditions of employment." [63] Representative William Ford, another key figure in adoption of the Udall amendment, indicated a similar understanding.[64]

These expressions of legislative purpose, however, cannot to be read in isolation.[65] Other statements by Members of Congress demonstrate that the narrow treatment anticipated for Section 7106(a) was not intended to swallow that section entirely. Representative Clay, for example,

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(1978) (remarks of Representative Clay) (Council departed from interpretative canon that management-rights clause be construed as narrow exception to obligation to bargain), reprinted in *Legislative History, supra* note 59, at 932.

[63] 124 Cong. Rec. 29183 (1978) (remarks of Representative Udall), reprinted in *Legislative History, supra* note 59, at 925.

[64] Representative Ford stated that

> [a] principal goal in revising the management rights clause is to change the current situation and, wherever possible, encourage both parties to work out their differences in negotiations. . . . In retaining a management right clause in our original draft of title VII, Mr. Clay and I, as well as the committee intended however that this section be read very narrowly. In agreeing to the Udall compromise of adding several more portions to this section, we fully intended that the committee's original position go unchanged and that this section be narrowly construed.

124 Cong. Rec. 29198 (1978) reprinted in *Legislative History, supra* note 59, at 954. See also 124 Cong. Rec. 29187 (1978) (remarks of Representative W. Clay), reprinted in *Legislative History, supra* note 59, at 932.

[65] See *Allen* v. *State Bd. of Elections, supra* note 58, 393 U.S. at 568-569, 89 S.Ct. at 833, 22 L.Ed.2d at 19; *cf. Richards* v. *United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 591-592, 7 L.Ed.2d 492, 499 (1962).

introduced his discussion of Section 7106(a) by observing that "at *no time* during the Committee deliberations or afterwards was it suggested that Federal employee labor organizations should be allowed to bargain over *every conceivable topic.*" [66] Representative Ford, a strong advocate of employee rights,[67] similarly voiced an expectation that the management-rights clause "will adequately protect *genuine* managerial rights." [68]

Perhaps more importantly, however, the legislative history also reflects a broader congressional desire to pre-

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[66] 124 Cong. Rec. 29187 (1978) (remarks of Representative Clay) (emphasis added), reprinted in *Legislative History, supra* note 59, at 932.

[67] Representative Ford's comments on the House floor attest his stand. See, *e.g., id.* at 29198 (remarks of Representative W. Ford), reprinted in *Legislative History, supra* note 59, at 953.

[68] *Id.* at 29199 (remarks of Representative W. Ford) (emphasis added), reprinted in *Legislative History, supra* note 59, at 956. He continued:

> Thus, although management has the right to direct the work force, proposals aimed at lessening the adverse impact on employees of an exercise, perhaps arbitrary, of that right are fully negotiable.

Id. This reference to negotiation on questions of adverse impact is an allusion to § 7106(b)(3), which provides that "nothing . . . shall preclude an agency and labor organization from negotiating . . . appropriate arrangements for employees adversely affected by the exercise of any [management] authority." 5 U.S.C. § 7106(b)(3) (Supp. IV 1980). This section appeared in the Committee version, and was retained with little change in the Udall amendment. Compare H.R. 11280, §§ 7106(b)(1)-(2), 96th Cong., 1st Sess. (1978), reprinted in *Legislative History, supra* note 59, at 372, 392, with 124 Cong. Rec. 29176 (1978) (Udall amendment), reprinted in *Legislative History, supra* note 59, at 911. Representative Ford's own dissatisfaction with the relatively limited scope of bargaining under Executive Order 11491 was alleviated, at least in part, by inclusion of this provision. See *id.* at 29198 (remarks of Representative W. Ford), reprinted in *Legislative History, supra* note 59, at 953.

serve the Federal Government's ability to operate in an effective and efficient manner. Both the House and the Senate Reports emphasize this important goal.[69] Representative Clay, supporting the Udall amendment, declared that "the public and taxpayer deserve the more effective and efficient federal government that is [a] predictable result of" the Udall program.[70] Senator Percy pointed out during floor debate that the bill sought to balance employee rights against "the need of the government to maintain the efficiency of its operations."[71] Indeed, we are required by the very terms of the Act to interpret its provisions "in a manner consistent with the requirement of an efficient and effective Government."[72] It thus is clear that Congress expressly recognized and protected

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[69] See S. Rep. No. 95-969, 95th Cong., 2d Sess. 2-4 (1978), reprinted in *Legislative History*, *supra* note 59, at 745-755; H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 3 (1978), reprinted in *Legislative History*, *supra* note 59, at 679; see also Message of President Carter to the Congress, 14 Weekly Comp. of Pres. Doc. 444 (March 2, 1978), reprinted in *Legislative History*, *supra* note 59, at 622.

[70] 124 Cong. Rec. 29187 (1978) (remarks of Representative Clay), reprinted in *Legislative History*, *supra* note 59, at 931.

[71] 124 Cong. Rec. 33389 (1978) (remarks of Senator Percy), reprinted in *Legislative History*, *supra* note 59, at 1040; *cf. id.* at 29182 (remarks of Representative Udall) (Act creates balance between management and employee rights), reprinted in *Legislative History*, *supra* note 59, at 923. Senator Percy was the ranking minority member of the Senate Committee on Governmental Affairs, which was responsible for the legislation in the Senate. 124 Cong. Rec. 5482 (1978) (remarks of Senator Percy), reprinted in *Legislative History*, *supra* note 59, at 1006.

[72] 5 U.S.C. § 7101(b) (Supp. IV 1980), in full text reading:

> It is the purpose of [the Act] to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of [the Act] should be interpreted in a manner consistent with the requirement of an effective and efficient government.

the Government's ability to create and preserve an efficient and effective civil service system.[73]

As we recently observed in *Department of Defense* v. *FLRA*,[74] Congress also intended that the judgment and balance essential to determinations on the bargainable nature of issues arising under the Act would be exercised, not by courts, but instead by the Authority.[75] Thus, in *Department of Defense* we concluded that the distinction between proposals encroaching on management's nonnegotiable substantive authority and those concerning properly negotiable procedural matters was primarily to be made by the Authority in an exertion of its expertise[76]— the result, we said, best serving the congressional design.[77]

C. *The Authority's Decision*

Given these manifestations of legislative intent, we simply cannot say that the Authority's decision in the case at bar is not reasonably defensible. On the contrary, it is plain enough to us that its logic and outcome are entirely faithful to the statutory goals.

In finding that petitioner's proposal interfered with rights conferred upon management by Section 7106(a),[78] and thus was not negotiable, the Authority first examined the nature of the management prerogatives confirmed by that section.[79] The right to "direct employees" was de-

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[73] See *Department of Defense* v. *FLRA*, *supra* note 15, 212 U.S.App.D.C. at 276-278, 659 F.2d at 1160-1162.

[74] *Supra* note 15.

[75] 212 U.S.App.D.C. at 277, 659 F.2d at 1161.

[76] *Id.* The distinction between procedure and substance, so crucial in *Department of Defense*, is not at issue in the present case.

[77] *Id.*

[78] See 5 U.S.C. § 7106(a) (Supp. IV 1980), quoted in relevant part text *supra* at note 10.

[79] *NTEU*, *supra* note 31, 3 F.L.R.A. at 775.

fined by the Authority as embracing the ability to supervise and guide employees in the performance of their jobs;[80] the right to "assign work," the Authority held, includes the exercise of discretion in determining the duties to be assigned, the particular employees to whom work will be assigned, and the timetables for work completion.[81] Management exercises these rights, in the Authority's view, "through supervising and determining the quality and timeliness of work production and establishing priorities for its accomplishment."[82] In sum, the Authority concluded that, by virtue of the provisions of Section 7106(a), management retained the nonnegotiable right to determine what work will be done, and by whom and when.

The Authority also considered this right properly exercisable in part through formulation of performance standards for critical job elements. After reviewing Section 4302[83] and the Office of Personnel Management's

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[80] *Id.* Finding no pertinent legislative history or contradictory statutory language, the Authority relied upon the plain meaning of the word "direct" in construing this statutory phrase. *Id.*; see *Webster's Third International Dictionary* (unabridged) (1976). It goes almost without saying that this is an established and satisfactory technique of statutory construction. See, *e.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199 & nn. 20-21, 96 St.Ct. 1375, 1384 & nn. 20-21, 47 L.Ed.2d 668, 680 & nn. 20-21 (1976); *Lubrizol Corp.* v. *EPA*, 183 U.S.App.D.C. 288, 297, 562 F.2d 807, 816 (1977).

[81] *NTEU*, *supra* note 31, 3 F.L.R.A. at 775.

[82] *Id.* at 775-776.

[83] 5 U.S.C. § 4302 (Supp. IV 1980); see notes 37-41 *supra* and accompanying text. The Senate Report accompanying the Act, in discussing § 4302, states:

> The section specifically encourages employee participation in establishing performance objectives. Experience has shown that doing so motivates employees to accomplish the objectives. Management will have the ultimate responsibility under this section, however, to establish performance standards.

S. Rep. No. 95-969, 95th Cong., 2d Sess. 41 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2763. The last sentence

regulations thereunder,[84] the Authority ascertained that

> performance standards established the minimum level of job performance required of an employee. . . . Critical elements are those components of the job which are of sufficient importance that failure to achieve the level . . . established in the performance standard requires remedial action.[85]

Thus understood, performance standards for critical job elements were deemed by the Authority to be directly determinative of the level of work output and caliber of work product to be achieved.[86] In the Authority's view, these standards are more than mere ex post facto meaures of employee performance; they mark out beforehand the amount, quality and timeliness of the work employees are to perform. Negotiations on these aspects of a performance-appraisal system, the Authority declared, would "require an agency to bargain the quantity, quality, and timeliness standards which it must establish in making work assignments and directing employees." [87] Formulation of performance standards for critical job elements was therefore held to fall within the scope of management's reserved right to "direct employees" and "assign work." [88]

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appears to support quite strongly the construction given § 7106(a) by the Authority in this case. See notes 89-90 *infra* and accompanying text. The Authority, however, did not rely upon this statement, and instead focused its attention upon the provisions of the Act itself. See *NTEU, supra* note 31, 3 F.L.R.A. at 773, 775. In reviewing that decision, we concentrate on the legislative history of the Act as well as its text. See notes 89-95 *infra* and accompanying text.

[84] 5 C.F.R. § 430.202(d)-(e) (1982); see notes 37-38 *supra* and accompanying text.

[85] *NTEU, supra* note 31, 3 F.L.R.A. at 774 (footnote omitted).

[86] *Id.*

[87] *Id.* at 778.

[88] *Id.* (footnote omitted).

We can find no error in this reasoning.[89] Without a doubt, the right to determine what work will be done, and by whom and when it is to be done, is at the very core of successful management of the employer's business, whether a private-sector enterprise or the public service operations of a federal agency. It follows necessarily that this right is essential to management's ability to achieve optimum productivity, and accordingly to the agency's ability to function in an effective manner. The Authority's construction of Section 7106(a) as a reserva-

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[89] Like the Authority, see *id.* at 776-777, we are not troubled by petitioner's plaint that this construction of the Act varies from holdings of its predecessor, the Federal Labor Relations Council. See Brief for Petitioner at 23-25. The Act specifies:

> Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this [Act], shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this [Act] or by regulations or decisions issued pursuant to this [Act].

5 U.S.C. § 7135(b) (Supp. IV 1980). We discern in this language no impediment to changed statutory interpretations by the Authority, for this provision in terms preserves the efficacy of rulings under preexisting executive orders only to the extent that they are not "superseded by specific provisions of" the Act "or by regulations or decisions issued pursuant" thereto. Not surprisingly, the Act's legislative history similarly evinces a congressional determination not to bind the newly-created Authority inextricably to determinations made by the Council. See, *e.g.*, 124 Cong. Rec. 29200 (1978) (remarks of Representative W. Ford) (section was intended to make clear that the Authority is not to repeat past mistakes of Council in area of federal labor-management relations), reprinted in *Legislative History, supra* note 59, at 958; 124 Cong. Rec. 29188 (1978) (remarks of Representative Clay) (section expresses recognition that new Authority is not to duplicate Council's errors, but instead is to issue decisions superseding those of Council), reprinted in *Legislative History, supra* note 59, at 933. Moreover, as we noted in *Department of Defense*, "Congress plainly viewed § 7106, if not [the Act] as a whole, as a departure from the law that had developed under a comparable section of Executive Order 11491." 212 U.S.App.D.C. at 279, 659 F.2d at 1163.

tion of this invaluable right to management, thereby insulating it from dilution at the bargaining table, is thus fully obedient to the congressional command that the Act be interpreted in a manner consistent with the exigencies of efficient government.[90]

The Authority's holding with regard to the nature of performance-appraisal systems similarly respects the Act's legislative history. Just what effect performance standards have in the workplace is, as the present litigation illustrates, a matter on which reasonable people may well differ;[91] and, like the distinction between negotiable agency procedures and nonnegotiable substantive managerial authority which we reviewed in *Department of Defense*, any assessment of the impact calls for an exercise of "judgment and balance."[92] In concluding that performance standards for critical elements of an employee's job not only serve as a basis upon which past employee performance can be measured, but also tend in the first instance to establish the level of output that is to be achieved, the Authority made a judgment and balance we are not at liberty to disturb. As we said in *Department of Defense*, Congress anticipated that issues arising under the Act requiring expert judgment on federal labor-management relationships would be resolved by the Authority as the agency entrusted with the responsibility

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[90] See 5 U.S.C. § 7101(b) (Supp. IV 1980); notes 5 & 10 *supra* and accompanying text. Our ruling on this point harmonizes with *Department of Defense*, wherein we upheld the Authority's construction of § 7106(a) as a reservation of limited management discretion in employee selection, *Department of Defense* v. *FLRA*, *supra*, note 15, 212 U.S.App.D.C. at 278, 659 F.2d at 1162—a construction dictated, we said, by the same statutory command. *Id.*

[91] See *Department of Defense* v. *FLRA*, *supra* note 15, 212 U.S. App.D.C. at 267, 659 F.2d at 1151.

[92] *Id.* at 277, 659 F.2d at 1161; see notes 74-75 *supra* and accompanying text.

for policy in that area.[93] We thus find no "compelling indication[s] of error"[94] in the Authority's determination that prescription of performance standards and identification of critical job elements are confined exclusively to management by Section 7106(a).[95]

Nor can we say that the Authority misapplied Section 7106(a), so construed, to the union proposal in issue here. In reviewing the Authority's application of the Act to the facts of the case, we need only find that its action was neither arbitrary, capricious, abusive of discretion nor contrary to law.[96] The Authority's holding clearly meets

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[93] 212 U.S.App.D.C. at 277, 659 F.2d at 1161; see 5 U.S.C. § 7105(a)(1) (Supp. IV 1980), reading:

> The Authority shall provide leadership in establishing policies and guidance relating to matters under this [Act], and, except as otherwise provided, shall be responsible for carrying out the purpose of this [Act].

[94] See text *supra* at note 57.

[95] Section 7106 also endows management with the right to "lay off, and retain employees." 5 U.S.C. § 7106(a)(1) (Supp. IV 1980); see text *supra* at note 11. The legislative history of the section demonstrates that, in reserving this power, "Congress sought . . . to strengthen the authority of federal management to hire and to discipline employees." *Department of Defense* v. *FLRA*, *supra* note 15, 212 U.S.App.D.C. at 261, 659 F.2d at 1145, citing H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 4 (1978), reprinted in *Legislative History*, *supra* note 59, at 680; S. Rep. No. 95-969, 95th Cong., 2d Sess. 4 (1978), reprinted in *Legislative History*, *supra* note 59, at 746. This objective is, of course, consistent with the congressional resolve to ensure efficient and effective governmental operations. See notes 4-11 and accompanying text. We note in this regard that performance standards for critical job elements, to the extent that they establish the level of achievement necessary for job retention, appear to implicate management's reserved prerogative to "lay off, and retain" employees. The Authority, however, did not advance this line of reasoning in its decision, and it is not necessary for us to express any view as to validity.

[96] *Department of Defense* v. *FLRA*, *supra* note 15, 212 U.S.App. D.C. at 279-280, 659 F.2d at 1163-1164; see 5 U.S.C. § 7123 (Supp. IV at 1980); *id.* § 706 (1976); see text *supra* at note 52.

that test. Petitioner's proposal would set up batch-processing as a critical job element and nine batches per hour as the performance standard.[97] Affirming, as we do, the Authority's interpretation of Section 7106(a), we cannot say that its finding that the proopsal would conflict with management's right thereunder to direct employees and assign work is either arbitrary, capricious or a misapplication of discretion.

It is important to note that the agency construction of Section 7106(a) which we approve today does not preclude bargaining between management and employees on matters not directly related to the substantive components of performance standards or critical elements of the job. Section 4302(a)(2) of the Act instructs federal agencies to encourage employee participation in the establishment of performance standards,[98] but does not specify the manner in which that participation should occur. The Authority, in its decision, indicated that the form which employee participation will assume is within agency discretion, but nonetheless is an appropriate subject for negotiation.[99] The Authority thus remains responsive to the statutory direction to in some way afford to employees ample opportunity for input on what the standards should be, and has drawn the line only on a role enabling employee veto of such standards as the agency ultimately deems necessary. We find no fault in this position.

We are advertent, too, to Section 7106(b), which specifically directs agency officials to bargain over the procedures to be used in exercising managerial authority, and over the arrangements appropriate for employees ad-

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[97] See note 32 *supra* and accompanying text.

[98] 5 U.S.C. § 4302(a)(2) (Supp. IV 1980).

[99] *NTEU*, *supra* note 31, 3 F.L.R.A. at 778.

versely affected by such exercises.[100] The agency may thus be required, in compliance with Section 4302's mandate of employee participation,[101] to negotiate on procedures governing establishment of performance standards and identification of critical job elements. The Office of Personnel Management, in the proceeding under review, suggested a variety of procedural implications of performance-appraisal systems over which an agency might need to bargain.[102]

Lastly, as the Authority also recognized,[103] any employee may challenge an established performance standard in the context of a grievance proceeding conducted pursuant to the Act.[104] Thus, should disciplinary action be taken against an employee on the ground of unacceptable performance, that employee may claim during an ensuing grievence proceeding that the standard by which his or her performance was measured is not objective or not job-related,[105] or that it is inherently impossible of

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[100] 5 U.S.C. § 7106(b) (Supp. IV 1980), providing:

> Nothing in this section shall preclude any agency and any labor organization from negotiating—
>
> (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to an organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

[101] See text *supra* at note 98.

[102] See *NTEU*, *supra* note 31, 3 F.L.R.A. at 778.

[103] *Id.*

[104] 5 U.S.C. §§ 7701(c)(1)(A) (Supp. IV 1980); see *id.* § 7121(e)(2).

[105] See *id.* § 4302.

performance. Our decision today does not deprive federal employees of input into the development of performance-appraisal systems, or the ability to challenge components of such a system once in place.

We sustain, then, the Authority's construction of Section 7106(a) as consistent with the Act and its legislative history. We also uphold the Authority's application of that section, as construed, in the case at bar. Accordingly, the decision reviewed herein is

Affirmed.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 0-NG-194

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1968,
Union

and

DEPARTMENT OF TRANSPORTATION,
SAINT LAWRENCE SEAWAY DEVELOPMENT CORPORATION,
MASSENA, NEW YORK,
Agency

DECISION AND ORDER ON
NEGOTIABILITY ISSUES

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 *et seq.*).

Union Proposal 1

Section 1: The parties agree that critical elements of a position used for performance appraisal will be based only on the grade controlling factors of a position for which there will be an accurate position or job description. *Such critical elements for performance appraisals will be weighted in direct proportion to the relative importance in grade determination.* Each employee will be given a copy of the critical elements for their position at the beginning of the appraisal year. [Only the underscored portions of this proposal have been alleged to be outside the duty to bargain.]

Question Here Before the Authority

The question presented is whether the underscored portions of the Union's proposal violate section 7106(a)(2)(A) and (B) of the Statute and are, therefore, not within the duty to bargain.

Opinion

Conclusion and Order: The underscored portions of the proposal violate section 7106(a)(2)(A) and (B) of the Statute.[1] Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations (5 CFR 2424.10, *as amended by* 45 F.R. 48575), IT IS ORDERED that the petition for review of the disputed proposal be dismissed.

Reasons: Taken together, the language of the disputed portions of the proposal would require that the critical elements of a position be based only on the grade-controlling factors of a position and be weighted in direct proportion to their relative importance in grade determination. Consistent with this language, the Union states in the record its intent that the proposal "restrict critical elements to only those factors which are grade controlling" components of a job.[2] Thus, the proposal on its

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[1] Section 7106 of the Statute (5 U.S.C. § 7106) provides, in relevant part, as follows:

§ 7106. *Management rights*

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

* * * *

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted[.]

[2] Union Response at 14.

face, and as interpreted by the Union, would not permit the Agency to designate as a critical element any component of a job other than a grade-controlling component. Notwithstanding this conceded limitation under the proposal on what could be designated a critical element of a position, the Union argues, first of all, the proposal does not interfere with management's right to assign other duties to an employee and, secondly, the proposal merely "establishes a standard by which an appropriate third party will be able to judge the adequacy of any challenged critical element." These arguments cannot be sustained.

In its decision in *National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt*, 3 FLRA No. 119 (1980), the Authority held a proposal which would have identified a particular critical element of a position and established the standard of performance for that element was outside the duty to bargain because it was inconsistent with management's statutory authority to direct its employees and assign work under section 7106(a)(2)(A) and (B) of the Statute. In *American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C.*, 3 FLRA No. 120 (1980), the Authority held that a proposal which, in contrast, established a general, nonquantitative requirement by which the application of the critical elements and performance standards developed by agency management could subsequently be evaluated in a grievance by an employee who believed he or she had been adversely affected by the application of those critical elements and performance standards to him or her was within the duty to bargain.

The decision in *Bureau of the Public Debt* is controlling as to the disputed portion of the proposal in the present case because that part of the proposal expressly would preclude the Agency from establishing particular critical elements, *i.e.*, those which are not based on grade-

controlling factors for a particular job. Such a limitation would directly prevent management from exercising its statutory authority to direct employees and assign work by establishing the critical elements of positions. Similarly, the proposal at issue herein is distinguishable from the one held to be within the duty to bargain in *AFGE, Local 32*. In the present case, the proposal would not merely prescribe general, nonquantitative criteria under which an arbitrator could review application to an employee of a performance standard established by Agency management. Rather, as already stated, it would preclude management from identifying and establishing as a critical element any job element which is not grade-controlling. Thus, for the reasons more fully set forth in *Bureau of the Public Debt*, the instant proposal is outside the duty to bargain.

Union Proposal 2

> *Section 3. Employee's annual performance rating will be the result of the application of standards of performance to the appropriate critical elements of a position established in accordance with Sections 1 and 2 above.* All performance appraisals shall be in writing, given to the employee and state in detail the basis for the rating. The employee shall be given adequate opportunity to improve performance, not limited to the statutory notice period, and management will make a sincere effort to assist the employees in improving performance to the level required. [Only the underscored portion of this proposal has been alleged to be outside the duty to bargain.]

Question Here Before the Authority

The question presented is whether the underscored portion of the Union's proposal is, as alleged by the Agency, inconsistent with law and Government-wide

rules or regulations and, therefore, excluded from the obligation to bargain under section 7117(a)(1) of the Statute.

Conclusion and Order: To the extent the proposal prescribes periodic appraisal of employees on an annual basis it is consistent with law and Government-wide rules or regulations and, therefore, is within the duty to bargain. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations (5 CFR 2424.10, *as amended by* 45 F.R. 48575), IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the subject proposal except as indicated below.[3] The remaining part of the underscored portion of the Union's proposal is inconsistent with section 7106(a)(2)(A) and (B) of the Statute to the extent that it incorporates by reference the requirements of Union Proposal 1, held to be outside the duty to bargain at page 2 of this decision. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations (5 CFR 2424.10, *as amended by* 45 F.R. 48575), IT IS ORDERED that the Union's appeal be dismissed to that extent.

Reasons: On its face and as interpreted by the Union the proposal principally is concerned with the frequency of the "periodic" appraisals of job performance required under section 4302 of title 5 of the United States Code, as amended by the Civil Service Reform Act.[4]

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[3] In so deciding that the proposal to this extent is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

[4] 5 U.S.C. § 4302(a)(1) provides as follows:

> § 4302. *Establishment of performance appraisal systems*
>
> (a) Each agency shall develop one or more performance appraisal systems which—
>
> (1) provide for periodic appraisals of job performance of employees[.]

The proposal would require, in this regard, an annual rating.

The Agency interprets the proposal, however, as limiting management's right to periodically appraise an employee's performance and, where necessary, to take appropriate action under law, 5 U.S.C. § 4303, and implementing regulations.[5]

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[5] 5 U.S.C. § 4303 provides as follows:

§ 4303. *Actions based on unacceptable performance*

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more

than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is a preference eligible or is in the competitive service and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title.

(f) This section does not apply to—

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

Agency Statement of Position at 3.

The Agency's characterization of the proposal cannot be sustained. The proposal does not in any manner purport to prohibit Agency management from taking action consistent with applicable laws and regulations at any time the Agency determines that an employee's performance warrants such action. The proposal simply does not address such matters.

Rather, as indicated, the proposal merely requires that employee performance appraisals be conducted on an annual basis. In this regard, 5 U.S.C. § 4302(a)(1), *supra*, note 4, requires that performance appraisal systems provide for periodic appraisal of employee job performance but does not specify the frequency with which such appraisals must occur. Similarly, the implementing regulations of the Office of Personnel Management (OPM), in particular, 5 CFR 430.203(e), indicate that each agency has discretion in establishing the frequency of the periodic appraisal required in an appraisal system under 5 U.S.C. § 4302. In this regard, the OPM regulations state as follows:

> § 430.203 *The performance appraisal process.*
>
> • • • •
>
> (e) 5 U.S.C. 4302 requires that each appraisal system shall provide for periodic appraisals of performance. Employees shall generally be appraised on at least an annual basis. Agencies may provide for longer appraisal periods when duties and responsibilities of a position or the tour of duty of a position so warrant.

Thus, under both law and OPM regulations the frequency of periodic performance appraisals is a matter within the discretion of the Agency. Hence, to the extent that the proposal would establish such frequency, *i.e.*, provides for annual performance appraisals, it is not inconsistent with, but merely implements, the requirements of law and regulation for periodic appraisals and does not pre-

vent management from taking appropriate action under law. In this respect, therefore, contrary to the position of the Agency, the proposal is within the duty to bargain.

Finally, Union Proposal 2 provides that critical elements of a position shall be identified by Agency management in accordance with section 1, *i.e.*, herein, Union Proposal 1, *supra*. To the extent that section 1 has been determined to be outside the duty to bargain under section 7106 of the Statute, section 3, *i.e.*, Union Proposal 2, is likewise outside the Agency's duty to bargain under the Statute.

Union Proposal 3

> *Section 4.* There shall be no secret studies bearing on performance appraisals. All studies conducted by the corporation will be conducted on typical workers under normal working conditions. *The Union shall participate on an equal basis in the development or revisions of all measures of performance and studies including but not limited to selection of typical workers and conditions. If agreement cannot be reached, formal negotiations will be convened. Any impasses will be referred to the Federal Service Impasses Panel for resolution.* [Only the underscored portion of this proposal has been alleged to be outside the duty to bargain.]

Question Here Before the Authority

The question presented is whether the underscored portion of the Union's proposal is within the duty to bargain under the Statute or, as alleged by the Agency, the proposal violates section 7106 of the Statute.

Opinion

Conclusion and Order: The underscored portion of the proposal would require negotiation on the content of performance standards and, therefore, violates section 7106(a)(2)(A) and (B) of the Statute. Accordingly,

pursuant to section 2424.10 of the Authority's rules and regulations (5 CFR 2424.10, *as amended by* 45 F.R. 48575), IT IS ORDERED that the petition for review of the underscored portion of the disputed proposal be dismissed.

Reasons: The underscored portion of Union Proposal 3 would require bargaining to impasse concerning the particular performance standards to be established for employees in the bargaining unit. Consequently, that portion of the proposal bears no material difference in its effect from the proposal which was before the Authority in *Bureau of the Public Debt, supra*, page 3. In that decision, the Authority held that a proposal to establish a particular critical element and performance standard was inconsistent with management's rights to direct employees and to assign work under section 7106(a)(2)(A) and (B) of the Statute and, therefore, was not within the duty to bargain. Therefore, for the reasons fully set forth in *Bureau of the Public Debt*, the proposal here in dispute, to the extent that it would require negotiations on particular performance standards and critical elements, must also be held to be outside the duty to bargain.

Union Proposal 4

Section 6. Any disputes under this Article may be resolved under the negotiated grievance procedure including but not limited to:

1. *Challenges to critical elements of position.*
2. *The measure of performance as set forth in performance standards.*
3. The performance appraisal itself.
4. *Any disputed action taken as a result of a performance appraisal will be treated as any other disciplinary matter.* [Only the underscored portions of this proposal have been alleged to be outside the duty to bargain.]

Question Here Before the Authority

The question presented is whether the underscored portions of the Union's proposal are inconsistent with law and Government-wide regulation.

Opinion

Conclusion and Order: Subsections 1 and 2 of the Union's proposal are inconsistent with law, *i.e.*, section 7106 of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations (5 CFR 2424.10, *as amended by* 45 F.R. 48575), IT IS ORDERED that the petition for review as to subsections 1 and 2 of the disputed proposal be dismissed. However, subsection 4 of Union Proposal 4 relates to the adverse affect on employees of the exercise of management's rights, *i.e.*, the application of critical elements and performance standards established by management, within the meaning of section 7106(b)(3) of the Statute and, thus, is not excluded by law from the scope of a negotiated grievance procedure; nor is it otherwise contrary to law and Government-wide regulation. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations (5 CFR 2424.10, *as amended by* 45 F.R. 48575), IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) barbain concerning subsection 4 of the Union's proposal.[6]

Reasons: Union Proposal 4, insofar as dispute herein, would extend the coverage of the negotiated grievance procedure to the Agency's identification of the critical elements of a position and establishment of performance standards, and to any action taken pursuant to the application of such critical elements and performance standards to an employee in a performance appraisal. The

[6] In so deciding that subsection 4 is within the duty to bargain, the Authority makes no judgment as to the merits of that part of the proposal.

Agency alleges that the Union's proposal is contrary to section 7106 of the Statute. The Agency further alleges that subsection 4 of the proposal, in particular, violates applicable law and Government-wide regulation by requiring any action taken as a result of a performance appraisal to be treated as any other disciplinary matter. For the following reasons, the Authority sustains the Agency's position as to subsections 1 and 2 of the proposal, but not as to subsection 4.

Consistent with the language and the legislative history of the Statute, the Authority has held that the scope of a negotiated grievance procedure shall extend to all matters which under provisions of law could be covered unless the parties negotiate the exclusion of such matters. *American Federation of Government Employees, AFL-CIO, Local 3669 and Veterans Administration Medical Center, Minneapolis, Minnesota*, 3 FLRA No. 48 (1980); *American Federation of Government Employees, Local 547, AFL-CIO and Veterans Administration Medical Center, Tampa, Florida*, 4 FLRA No. 50 (1980). In this regard, the Authority decided in *National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt*, 3 FLRA No. 119 (1980), that the identification of the critical elements of a position and the establishment of performance standards constitute an exercise of the rights of agency management to direct its employees and to assign work under section 7106 of the statute. Therefore, as to Union Proposal 4, the question presented is whether, in extending the coverage of the grievance procedure to the Agency's exercise of its authority to identify the critical elements of a position (subsection 1), to establish performance standards (subsection 2), and to any action taken as a result of a performance appraisal (subsection 4), the proposal violates section 7106(a)(2)(A) and (B) of the Statute and thus is outside the duty to bargain.

Section 7106 of the Statute provides in relevant part, as follows:

§ 7106. *Management rights*

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted[.]

* * * *

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

The plain language of section 7106 provides that "nothing" in the Statute, *i.e.*, 5 U.S.C. § 7101 *et seq.*, shall

"affect the authority" of an agency to exercise the rights enumerated therein. Therefore, no grievance procedure could be negotiated pursuant to section 7121 of the Statute which would deny the authority of an agency to exercise its statutory rights under section 7106.[7] Section 7106 also provides that the rights of Agency management set forth therein are subject to the provisions of section 7106(b), *i.e.*, section 7106(b)(2) and (3). However, subsections 1 and 2 of Union Proposal 4 are not concerned in any manner with procedures leading up to or appropriate arrangements for employees adversely affected by the exercise of Agency management's right to identify critical elements and to establish performance standards. Thus, the provisions of section 7106(b)(2) and (3) are not applicable to the disposition of subsections 1 and 2 of the proposal.

More particularly, subsections 1 and 2 of Union Proposal 4, by providing for grievances which challenge the Agency's identification of the critical elements of a position and establishment of performance standards, would permit negotiated grievance procedures to extend to the Agency's exercise of its rights to direct employees and to assign work under section 7106(a)(2)(A) and (B). These subsections of the proposal thereby would subject the Agency's exercise of these reserved rights to arbitral review and therefore to the possibility of arbitrators substituting their judgment for that of the Agency with respect to those statutory rights. That is, subsections 1 and 2 would, in effect, permit arbitrators to overturn the Agency's identification of critical elements and establishment of performance standards and to render awards which would require the Agency to use different critical elements or set different standards,

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[7] *Cf. American Federation of Government Employees, AFL-CIO, Local 1603 and Navy Exchange, Naval Air Station, Patuxent River, Maryland*, 3 FLRA No. 1 (1980) at 2-3 of the decision; *International Association of Fire Fighters, Local F-61 and Philadelphia Naval Shipyard*, 3 FLRA No. 66 (1980) at 13 of the decision.

contrary to the Agency's rights under the Statute. Thus, by providing for arbitral review of Agency management's identification of critical elements and establishment of performance standards pursuant to its statutory rights under section 7106, the proposed subsections 1 and 2 violate section 7106 and are outside the duty to bargain.

Turning now to subsection 4, this part of the Union's proposal provides that the grievance procedure extends to any action taken as a result of a performance appraisal. As noted above, *supra*, page 10, section 7106 of the Statute provides that an agency's exercise of the management rights reserved therein is subject to the provisions of subsection (b). That is, insofar as relevant herein, an agency is obligated, under section 7106(b)(2), to negotiate on procedures it will observe in exercising its reserved rights and, under section 7106(b)(3), on appropriate arrangements for employees adversely affected by the exercise of those rights. Thus, to the extent that matters proposed for inclusion within the scope of the negotiated grievance procedure constitute procedures under section 7106(b)(2) or appropriate arrangements under section 7106(b)(3) they are matters which under law can be covered by such procedures. For example, in *American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C.*, 3 FLRA No. 120 (1980), the Authority held a proposal establishing the criterion "fair and equitable" by which the application of critical elements and performance standards established by management could be evaluated in a subsequent grievance by an employee who believed that he had been adversely affected by the application of management's performance standard to him was within the duty to bargain. Thus, under the result in *AFGE, Local 32*, Agency management's right to establish performance standards and critical elements was not denied. However, an employee could challenge discipline for alleged failure to meet such standards through, for example, either "just cause" lan-

guage of an established grievance procedure or in accordance with a negotiated "fair and equitable" standard.

In this regard, subsection 4 of Union Proposal 4 provides, as indicated, that the grievance procedure extends to any action taken as a result of a performance appraisal, *i.e.*, to any action taken as a result of the application of critical elements and performance standards to an employee covered by the procedure. Thus, subsection 4 of Union Proposal 4 herein, in a manner similar to the proposal in *AFGE, Local 32*, extends the negotiated grievance procedure to matters relating to the adverse effect on an employee of the exercise of management's rights and, thus, does not violate section 7106 of the Statute.

As stated at the outset, in addition to its allegation that subsection 4 of the proposal violates section 7106 of the Statute, the Agency argues subsection 4 violates applicable law and Government-wide regulation by requiring any action taken as a result of a performance appraisal to be treated as any other disciplinary matter. That is, according to the Agency, subsection 4 would require an action for unacceptable performance to be processed as any other disciplinary action, rather than under the provisions of chapter 43 of title 5 of the United States Code specifically governing actions for unacceptable performance.[8] The Union states in response that subsection 4 merely provides, as a procedural matter consistent with law and regulation, that grievances challenging actions for unacceptable performance taken pursuant to section 4303, *see, supra*, note 5, may be brought under the contract provisions regarding disciplinary matters.

Thus, based on the Union's interpretation of its own proposal, the Agency has misinterpreted the effect of subsection 4. Contrary to the Agency contention, the

[8] Agency Statement of Position at 8-9.

Union's proposal does not require the utilization of the negotiated grievance procedure in place of the procedures governing actions for unacceptable performance set forth in section 4303(b)-(d). Rather, it merely states the procedures for processing a grievance challenging an action for unacceptable performance after the Agency has taken such action in accordance with the procedures set forth in section 4303. That is, subsection 4 provides that when an action for unacceptable performance pursuant to section 4303 is grieved under the provisions of the negotiated grievance procedure,[9] instead of appealed to the Merit Systems Protection Board in accordance with sections 4303(e) and 7701 of title 5 of the United States Code, such a grievance will be treated under the grievance procedure as would any other disciplinary action. In this connection, the Union expressly concedes that an arbitrator, in reviewing a grievance for unacceptable performance pursuant to subsection 4, would be bound by the requirement in section 7121(e)(2) of the Stat-

[9] Section 7121(e)(1) of the Statute (5 U.S.C. § 7121(e)(1)) provides as follows:

§ 7121. *Grievance procedures*

* * * *

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

ute[10] to apply the standard set forth in section 7701 (c)(1).[11] The Authority adopts the Union's interpretation of subsection 4. So interpreted, the subsection is consistent with law and Government-wide regulation and is within the duty to bargain.

Accordingly, for the foregoing reasons, subsections 1 and 2 of Union Proposal 4 are outside the duty to bargain and subsection 4 is within the duty to bargain.

Issued, Washington, D.C., February 9, 1981

/s/ Ronald W. Haughton
RONALD W. HAUGHTON
Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III
Member

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE
Member
FEDERAL LABOR RELATIONS AUTHORITY

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[10] Section 7121(e)(2) of the Statute (5 U.S.C. § 7121(e)(2)) provides as follows:

§ 7121. *Grievance procedures*

* * * *

(e)(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

[11] 5 U.S.C. § 7701(c)(1) provides, in relevant part, as follows:

§ 7701. *Appellate procedures*

* * * *

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence[.]

Union Response at 22 of Part I.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 0-NG-56

NATIONAL TREASURY EMPLOYEES UNION
(*Labor Organization*)

and

DEPARTMENT OF THE TREASURY,
BUREAU OF THE PUBLIC DEBT
(*Activity*)

DECISION ON NEGOTIABILITY ISSUES

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105 (a) (2) (E) of the Federal Service Labor-Management Statute (the Statute) (5 U.S.C. § 7101 *et seq.*).

Union Proposal

Accounts Maintenance Clerks, GS-502-3/5, must maintain the following minimum rates:

A. To retain his/her position incumbent must process 9.0 batches per hour.

B. To receive a within-grade step increase incumbent must process 9.0 batches per hour.

Question Here Before the Authority

The question is whether the Union proposal is outside the duty to bargain under section 7117(a) (1) of the Statute because it violates Federal law or any Government-wide rule or regulation, as alleged by the Agency.

Opinion

Conclusion: Subsection A of the Union's proposal establishing a specific number of batches per hour as the minimum standard for job retention is within the framework of the right of management to direct its employees and to assign work under section 7106(a) of the Statute. However, consistent with the intent of Congress as expressed in section 7101 of the Statute that employees participate through labor organizations of their own choosing in decisions which affect them, and other sections discussed hereinafter, the agency's right to identify critical elements and establish performance standards under section 7106(a) is subject to certain rights of a labor organization under the Statute. Specifically, under section 7117, as to units of exclusive recognition, it is within the duty of the agency to bargain, consistent with law and regulation, on aspects of performance appraisal systems other than identification of critical elements and content of performance standards. The duty to bargain extends to, among other matters, the form of the employee participation in the establishment of performance standards required under section 4302 of the Civil Service Reform Act (CSRA). In this connection, section 4302 in its reference to participation of employees in establishing performance standards refers to all employees, whether represented or unrepresented.

Furthermore, section 7106(a) is subject to section 7106(b). Under section 7106(b)(2) an agency has the duty to bargain on procedures which management officials will observe in the development and implementation of performance standards and critical elements; and, under section 7106(b)(3), on appropriate arrangements for employees adversely affected by the application of performance standards to them. In addition, under section 7114 of the Statute, the agency must afford an exclusive representative the opportunity to be present at

any formal discussion between an agency representative and a unit employee regarding the establishment or the implementation of performance standards and critical elements and, when requested, at any investigatory interview of a unit employee who reasonably believes that the examination may result in discipline for unacceptable performance under section 4303 of the CSRA. Finally, the right of an agency under section 7106(a) to identify critical elements and establish performance standards is subject to the right of an employee against whom disciplinary action has been taken. The employee has a right to challenge such action under the appellate procedures of section 7701 of the CSRA or under a negotiated grievance procedure pursuant to section 7121 of the Statute. In reference to subsection B of the proposal, it is determined the instant proposal is outside the Agency's duty to bargain because it conflicts with an applicable Government-wide regulation (5 CFR 531.407(c)(1)). Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations (5 CFR 2424.10), the Agency allegation that the proposal is not within the duty to bargain is sustained.

Reasons: The Union's proposal in this case would establish, in subsection A, the standards an employee must meet in order to continue in the employment of the agency and, in subsection B, to receive an increase in pay. The Union timely appealed to the Authority under section 7117(c) of the Statute from the Agency's allegation that the proposal was outside the Agency's duty to bargain under the Statute. Section 7114(a)(4), as relevant herein, provides as follows:

§ 7114. *Representation rights and duties*

* * * *

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of

arriving at a collective bargaining agreement. . . .

Section 7114(b)(2) states that the duty to negotiate in good faith shall include the obligation "to discuss and negotiate on any condition of employment." Conditions of employment are defined in section 7103(a)(14) as follows:

§ 7103. *Definitions; application*

(a) For the purpose of this chapter—

* * * *

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute . . . .

Section 7117(a)(1) further describes the duty to bargain in good faith as follows:

§ 7117. *Duty to bargain in good faith; compelling need; duty to consult*

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not consistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

Thus, the scope of the duty to bargain under section 7117(a)(1) of the Statute extends to conditions of employment, *i.e.*, personnel policies, practices and matters affecting working conditions, affecting employees in a unit of exclusive recognition unless the matters proposed for bargaining are inconsistent with Federal law or Government-wide rule or regulation.

The negotiability of subsection A of the Union's proposal stands or falls on the determination of whether it is inconsistent with Federal law or Government-wide rule or regulation under section 7117(a)(1). In this regard, the Agency alleges in part that, by requiring it to adopt a standard of nine batches an hour, the proposal conflicts with its right to direct employees under section 7106(a)(2)(A) of the Statute by preventing the Agency from requiring of an employee that he or she perform work beyond that which is required under the standard; and with its right to assign work under section 7106(a)(2)(B) by, among other things, limiting the amount of work which can be assigned.[1]

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[1] 5 U.S.C. § 7106 provides, as relevant herein, as follows:

§ 7106. *Management rights*

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

* * * *

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

* * * *

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

* * * *

In order to determine whether the proposal identifying a critical element and establishing a performance standard concerns matters which constitute an exercise of the rights reserved to management under section 7106 of the Statute, it is necessary to examine the nature of performance appraisal systems as provided for in Title II of the CSRA.

Section 4302 of the CSRA [2] requires each agency to de-

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(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

[2] 5 U.S.C. § 4302 provides as follows:

§ 4302. *Establishment of performance appraisal systems*

(a) Each agency shall develop one or more performance appraisal systems which—

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees;

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

velop one or more performance appraisal systems and states the basic requirements of such systems. Before discussing the nature of performance appraisal systems, reference is made to the requirement that each performance appraisal system encourage employee participation in the establishment of performance standards. The Union takes the position that the answer to whether the disputed proposal herein is within the duty to bargain is not found in section 4302.[3] The Authority agrees.

Section 4302 makes no distinctions between an agency's responsibility to encourage participation by employees within units of exclusive recognition and unrepresented employees. Thus, this section covers both represented and unrepresented employees and does not specify the form which such employee participation must take. As more fully discussed on page 10, *infra*, the duty to bargain extends to, among other matters, the form of the employee participation in the establishment of performance standards required under section 4302 of the CSRA; and the intent of the Statute and the express provisions of section 7114 require that an exclusive representative be given the opportunity to be represented at certain meetings between management and employees relating to the development and implementation of performance systems. In summary, it is the Statute, and not section 4302,

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(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

[3] Transcript of oral argument before the Authority on negotiability of proposals relating to performance appraisal systems, at 152.

which controls whether the identification of critical elements and the content of performance standards are within the scope of the duty to bargain.

Turning to the nature of performance appraisal systems, under section 4302 each system must provide for establishing "performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria . . . related to the job in question for each employee or position under the system." Section 4301 of the CSRA defines "unacceptable performance" as "performance of an employee which fails to meet established performance standards in one or more of the critical elements of such employee's position." Performance standards developed with employee participation are a measure of an employee's performance in crucial aspects of the employee's position, and "unacceptable performance" is the failure to accomplish the requirements of the job as stated in the standard for that aspect of the position. Section 4302(b)(4) provides for recognition and reward of employees whose performance so warrants. Section 4302(b)(5) and (6) provides for assistance to employees in improving unacceptable performance and action against employees who continue to perform unacceptably.

The Office of Personnel Management (OPM) is authorized under section 4302(b) to issue regulations implementing the statutory requirements regarding performance appraisal systems. As relevant to the dispute herein, OPM has, by regulation, defined the terms "performance standards" and "critical element:" [4]

> "Performance standards" are the expressed measure of the level of achievement established by management for the duties and responsibilities of a position or group of positions. Performance standards may

[4] 5 CFR 430.202(d) and (e) (1980).

include, but are not limited to, elements such as quantity, quality, and timeliness.

"Critical element" means a component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action and denial of a within-grade increase, and may be the basis for removing or reducing the grade level of that employee. Such action may be taken without regard to performance on other components of the job.

Thus, in terms of the law and implementing regulations, performance standards establish the minimum level of job performance required of an employee with regard to the duties and responsibilities of the employee's job. Critical elements are those components of the job which are of sufficient importance that failure to achieve the level of performance established in the performance standard requires remedial action.[5] As already noted, performance standards must be developed with employee participation and union involvement, as more fully discussed on pages 10-11, *infra*.

The description of the statutory and regulatory requirements for performance appraisal systems, outlined above, establishes a direct relationship between the content of performance standards and the identification of critical elements and the right of an agency to direct employees under section 7106(a)(2)(A) of the Statute and to assign work under section 7106(a)(2)(B) of the

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[5] These regulations literally provide for the establishment of performance standards by management. However, assuming that these regulations are Government-wide regulations within the meaning of section 7117 of the Statute and, as such, could constitute a bar to negotiation, the fact that the regulations are expressed in terms of management action to establish performance standards would not in and of itself render proposals to bargain those standards outside the duty to bargain. *Cf. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District*, 3 FLRA No. 118 (1980) at *118* of decision.

Statute. Although significant aspects of performance appraisal systems may be negotiated, analysis of the rights of management to direct its employees and assign work under section 7106(a) of the Statute, as subject to section 7106(b), leads to the conclusion that identification of critical elements and establishment of performance standards constitute an exercise of the aforementioned management rights.

The right to direct employees in the agency is not defined in the Statute, is not specifically discussed in the legislative history and has not been applied in prior decisions of the Authority. Therefore, consistent with the main purpose and meaning of the Statute and in the absence of any indication that the phrase as used in the Statute has a meaning other than its ordinary meaning,[6] the right "to direct . . . employees in the agency" means to supervise and guide them in the performance of their duties on the job.

The right to assign work to employees or positions under section 7106(a), subject to the provisions of section 7106(b), is composed of two discretionary elements: (1) the particular duties and work to be assigned, and (2) the particular employees to whom or positions to which it will be assigned.[7] Furthermore, management discretion in this regard includes the right to assign general continuing duties,[8] to make specific periodic work assignments to employees,[9] to determine when such as-

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[6] *See Webster's Third New International Dictionary* (Unabridged (1976)).

[7] *American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 FLRA No. 77 (1980), at 18 and 28 of decision.

[8] *American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey*, 2 FLRA No. 16 (1979) at 7-9 of decision.

[9] *National Labor Relations Board Union, Local 19 and National Labor Relations Board, Region 19*, 2 FLRA No. 98 (1980).

signments will occur [10] and to determine when the work which has been assigned will be performed.[11]

In the circumstances of this case, the rights to direct employees and assign work are exercised through supervising and determining the quantity and timeliness of work production, and establishing priorities for its accomplishment. The establishing of "critical elements" and "performance standards" as provided for in law and defined by regulation are among the ways in which management supervises and determines the quality, quantity, and timeliness of work required of employees. More particularly, under section 4302 of the CSRA and OPM regulations, a performance standard with respect to a critical element of an employee's job determines the level of work performance, i.e., whether in terms of, among other things, quantity, quality, or timeliness, which is acceptable for, *e.g.*, job retention, as expressed in the disputed proposal. In assessing the work which must be done to accomplish its mission, the agency makes determinations based upon its resources as to the aggregate level of output required to meet the need for its services. An integral part of accomplishing this mission is assigning work and establishing priorities. These decisions, when expressed in terms of an individual employee's job, translate into performance standards, that is, the quality and amount of work needed from each employee in order to achieve the agency's mission and functions. In this connection, the legislative history of the CSRA shows Congressional concern with promoting government effectiveness and efficiency, with the development of employee performance standards and critical elements to achieve this end, and encouraging employee

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[10] *Id.*

[11] *International Association of Fire Fighters, Local F-61 and Philadelphia Naval Shipyard*, 3 FLRA No. 66 (1980) at 1-4 of decision.

participation in the establishment of such performance standards.[12]

Performance standards are not merely measures of employee performance. They go to the levels of output and the quality of the work product. In this case, subsection A of the disputed proposal would establish a minimum requirement for job retention of 9 batches per hour. While that standard could be significant in terms of evaluating the performance of individual employees, it also would establish a level of output which is required in terms of the agency's directing employees and assigning work.

The Union argues its proposal would have been found to be within the duty to bargain pursuant to a cited decision of the Federal Labor Relations Council under E.O. 11491.[13] Apart from other considerations, the precedent relied upon is inapplicable in the circumstances of the present case. The performance standards and critical elements which are the subject of the instant dispute are defined by and must conform to the requirements of chapter 43 of the CSRA, which differ appreciably from the performance appraisal practices which were in effect at the time of the Council's decision. Further, in the cited case, the Council held, in effect, that the union's proposed procedure concerning the method for setting production goals and designating various levels of individual production as *prima facie* evidence in evaluating an employee's performance with respect to that factor, did not conflict with any reserved management rights.

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[12] *See*, Message of President Carter to the Congress, 14 Weekly Comp. of Pres. Doc. 444 (March 2, 1978); S. Rep. No. 95-969, 95th Cong., 2nd Sess. 2-4, 39-40 (1978). *See also* H.R. Rep. No. 95-1403, 95th Cong., 2nd Sess. 3-4, 20-21 (1978).

[13] *Patent Office Professional Association and U.S. Patent Office, Washington, D.C.*, 3 FLRC 635 (1975).

However, in the instant case, the Union's proposal is not procedural. It would require the Agency to bargain over its statutory authority to direct employees and assign work. It specifies a critical element of an employee's job and the performance standard with respect to the job element which must be met for job retention, thereby directly interfering with the statutory right of management to direct employees and assign work. As discussed hereinafter, these rights are subject to section 7106(b)(2) and (3) which requires management to negotiate on procedures and appropriate arrangements with respect to employees adversely affected by management's exercise of its rights.

The Union also asserts the legislative history of section 7106 indicates an intent that performance standards be subject to the duty to bargain. In support of this assertion, it cites the following statement of Congressman Udall: [14]

> The intent of this provision [section 7106(a)(2)(C)] is to preserve as bargainable (to the extent permitted by applicable laws and regulations) the standards, criteria, and procedures for establishing promotion certificates, while ensuring management's right to make the actual selection from the certificate, or to make the appointment from any other appropriate source.

The Union claims that, in the above statement, Congressman Udall "clearly stated that performance standards were to remain negotiable as they were under the Executive Order." [15]

Apart from any other considerations, this statement of Congressman Udall is not concerned with performance standards. Congressman Udall made this statement with

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[14] 124 Cong. Rec. H9634 (daily ed. Sept. 13, 1978).

[15] Union Response at 8.

respect to section 7106(a)(2)(C) which is concerned with management's right to fill positions and to make selections for appointments. On its face, the quoted language is specifically applicable to establishing promotion certificates. There appears to be no direct connection between standards for establishing promotion certificates and performance standards.

Further, the Union cited certain statements in the Congressional Record relating to an expanded scope of bargaining and the management rights provisions of the Statute.[16] These were general statements discussing the interpretation and application of the management rights provisions of the Statute. They essentially state that management rights provisions bar negotiation on those matters which directly and integrally affect such rights. Apart from other considerations, the decision here is not inconsistent with these principes.

Based on the foregoing, negotiation of performance standards and critical elements, as contained in the disputed proposal, would interfere with the authority of an agency to act as provided in section 7106(a). It already has been noted that this authority is subject to section 7106(b). Negotiation of critical elements and performance standards would require an agency to bargain the quantity, quality, and timeliness standards which it must establish in making work assignments and in directing employees. With particular regard to subsection A of the proposal at issue herein, the negotiation of the number of batches an employee is required to process under the proposal would restrict the Agency's decision in establishing priorities for the performance of work. In so doing, the proposal would prevent the Agency from exercising its authority to determine the minimum required level of output. Therefore, subsection A is outside the Agency's statutory duty to bargain.

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[16] Union Response at 7-11, citing from 124 Cong. Rec. H9634, H9638, and H9648-9 (daily ed. Sept. 13, 1978).

This decision does not mean that all matters related to establishing performance appraisal systems are outside the duty to bargain. Consistent with the intent of Congress as expressed in section 7101 and other sections of the Statute, performance appraisal systems, apart from the identification of critical elements and the establishment of performance standards, are within the duty to bargain, to the extent they are consistent with law and regulation. To the extent that an agency has discretion with respect to a given matter related to such systems the agency must upon request negotiate with an exclusive representative over that matter.[17] In particular, as noted previously, section 4302(a)(2) of the CSRA requires that performance appraisal systems "encourage employee participation in establishing performance standards" but does not specify the form which such employee participation must take. Consequently, among other significant aspects of performance appraisal systems, the manner in which a particular agency provides for such employee participation is within the agency's discretion and, therefore, within the duty to bargain to the extent that it would not prevent the agency from establishing performance standards and critical elements pursuant to its statutory rights to direct employees and assign work.[18]

In addition to the right of an exclusive representative to negotiate provisions related to the form of the employee participation required under section 4302 of the CSRA, the intent of the Statute and the express provisions of section 7114 require that an exclusive rep-

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[17] The OPM, which is an *amicus curiae* herein, so conceded in the oral argument before the Authority. Transcript of oral argument before the Authority, at 22. *See also Hearings Before the Committee on Post Office and Civil Service of the House of Representatives on H.R. 11280*, 95th Cong., 2nd Sess. 727 (1978).

[18] *Cf. American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C.*, 3 FLRA No. *120* (1980) at 4-6 of decision.

resentative be given the opportunity to be represented at certain meetings between management and employees relating to the development and the implementation of performance appraisal systems. Congress stated in section 7101 that statutory protection of the right of employees to participate through labor organizations of their own choosing in decisions which affect them safeguards the public interest, contributes to the effective conduct of public business, and encourages the amicable settlement of disputes. Consistent with this legislative intent to protect the right of employees to participate through labor organizations, section 7114 of the Statute provides, in relevant part, as follows:

> § 7114. *Representation rights and duties*
>
> * * * *
>
> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employees; and
>
> (ii) the employee requests representation.

As it pertains to the matters here in dispute, section 7114 provides that an exclusive representative is entitled to be represented at any meeting between a representative of the agency and a unit employee which

constitutes a formal discussion within the meaning of the Statute and which involves matters pertaining to performance appraisal systems, *i.e.*, the identification of critical elements and the establishment of performance standards. Similarly, the exclusive representative is entitled to be represented at an examination of an employee in connection with an investigation whenever a unit employee reasonably believes that the examination may result in disciplinary action for unacceptable performance under section 4303 of the CSRA ("*Actions based on unacceptable performance*") and requests representation.[19]

In addition, section 7106(b)(2) provides that management has a duty to bargain on the procedures which management officials will observe in exercising section 7106 rights. Similarly, section 7106(b)(3) provides that management has a duty to bargain on appropriate arrangements for employees adversely affected by management's exercise of its authority.[20] The legislative history relevant to these provisions makes clear that they are intended to authorize an exclusive representative to negotiate on such matters except to the extent that the establishment of procedures or appropriate arrangements through negotiations would prevent the agency from acting at all. Insofar as it is consistent with management's authority to act, Congress intended the parties to work out their differences in connection with these matters through negotiations.[21] Thus, to the extent consistent

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[19] *See* the statement of OPM at the oral argument before the Authority. Transcript of oral argument before the Authority, at 250-53.

[20] *See* note 1, *supra*.

[21] *American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey*, 2 FLRA No. 16 (1979) at 2-4 of decision; and *National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California*, 2 FLRA No. 30 (1979) at 5-6 of decision.

with law and regulation, the procedural context of performance evaluation, including procedures related to the identification of critical elements and the establishment of performance standards, and appropriate arrangements for employees adversely affected by actions taken under those standards, are subject to bargaining. This is consistent with the mandate of Congress as expressed in section 4302 that performance appraisal systems must encourage employee participation in the establishment of performance standards.

With further reference to procedures, OPM suggested an exclusive representative could negotiate with regard to the process by which critical elements and performance standards are communicated to employees, periodic appraisals at least on an annual basis, the manner in which the performance of employees on detail will be appraised, the manner in which an employee's disagreement with his or her performance appraisal will be reviewed, and the process by which proposed performance standards will be reviewed within the agency.[22] Creative approaches to collective bargaining may expand the possibilities suggested. The stated examples reflect the wide range of employee participation possible through negotiation within units of exclusive recognition and the variety of protections for employees which may be negotiated as a part of such systems.

Finally, an employee against whom disciplinary action has been taken based on unacceptable performance under section 4303 of the CSRA, may appeal the action to the Merit Systems Protection Board pursuant to section 7701 of the CSRA or, alternatively, raise the matter in the negotiated grievance procedure pursuant to section 7121.[23] In the context of negotiated grievance pro-

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[22] Transcript of oral argument before the Authority, at 244-45.

[23] 5 U.S.C. § 7701(c)(1)(A); 5 U.S.C. § 7121(e)(2). In either situation the decision rendered would be subject to judicial review. 5 U.S.C. § 7703(a)(1); 5 U.S.C. § 7121(f).

cedures it would be possible for an employee against whom action has been taken for unacceptable performance to grieve such action, contending that the performance standard as applied to the grievant pursuant to which the discipline was imposed is improper, or impossible of performance, under requirements of law or the parties' agreement. With regard to the requirements of law, section 4302(b)(1) of the CSRA requires that performance standards be objective and job-related. As was acknowledged by OPM at the oral argument, in the case of an employee subject to discipline for unacceptable performance, an arbitrator would be able to find a standard as applied was not objective or job-related in ruling on a grievance.[24]

With regard to the parties' agreement, nothing in this decision would preclude an exclusive representative from negotiating criteria for the application of performance standards which management has established. As the Authority determined with respect to a proposal requiring that performance standards be "fair and equitable" in *American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C.*, 3 FLRA No. 120 (1980), decided this date, such a criterion would not interfere with the agency's discretion as to the identification of critical elements and this establishment of the content of a particular performance standard. This criterion would merely establish a general requirement by which the application of critical elements and performance standards established by management could subsequently be evaluated when they are challenged in a grievance filed pursuant to section 7121(e) of the Statute. This type of review would not preclude the agency from initially determining the content of the standard, nor would it result in substitution of an arbitrator's judgment for that of the agency and setting a new standard. It would

[24] Transcript of oral argument before the Authority, at 248-49.

simply determine if the standard established by management as applied to the grievant complied with the requirements of the parties' agreement.

In conclusion, based upon the foregoing, subsection A of the Union's proposal is not within the duty to bargain because it is within the framework of the right of management to direct employees and to assign work under section 7106(a), and is not a procedure or an appropriate arrangement within the meaning of section 7106(b)(2) and (3) of the Statute.

Turning to subsection B of the Union's proposal, it would establish a minimum performance level of 9.0 batches per hour for the employee to be eligible to receive within-grade increases. The Agency contends the Union's proposal would violate 5 CFR 531.407(c)(1), set forth below (see page 14, *infra*). It asserts the proposal is outside the duty to bargain under section 7117 which provides, as stated previously, that the scope of the duty to bargain does not extend to matters which are inconsistent with any Government-wide rule or regulation.

The initial question is whether the applicable regulation of the Office of Personnel Management constitutes a "Government-wide rule or regulation" within the meaning of the Statute. The Authority considered the meaning of the phrase "Government-wide rule or regulation" in *National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District*, 3 FLRA No. 118 (1980) and determined that the provisions of the Federal Property Management Regulations in that case were generally applicable throughout the Federal Government and, as such, constituted Government-wide regulations within the meaning of section 7117.

The regulation at issue herein is codified at title 5 of the Code of Federal Regulations as a personnel manage-

ment regulation published by the Office of Personnel Management. This regulation is binding on most General Schedule employees of the executive branch and certain employees of the legislative branch. (5 CFR 531.402, 5 U.S.C. § 5102.) In this manner, the regulation is generally applicable to the Federal civilian work force as a whole, though not, of course, to every Federal employee. It is typical of the regulations issued by OPM and would appear to be the kind of regulation contemplated as a Government-wide regulation by the reference to OPM in the House Committee Report, as cited in the *New Orleans District* decision, *supra*. Therefore, the regulation asserted by the Agency as a bar to negotiation of subsection B of the Union's proposal is a Government-wide regulation within the meaning of section 7117(a).

The question then becomes whether subsection B of the proposal is inconsistent with the cited regulation. That regulation provides as follows:

> § 531.407 *Work of an acceptable level of competence.*
>
> * * * *
>
> (c) *Determination.* (1) In making his determinations, the head of an agency or his designee shall make effective use of this authority to stimulate optimum performance among his employees and:
>
> (i) Shall not award within-grade increases to employees who do not clearly meet the statutory standard for such award, recognizing that for these increases performance must be of sufficient level to merit a pay increase, not just adequate for retention on the job . . . .

The Union's proposal provides that the standard for eligibility to receive within-grade step increases for Accounts Maintenance Clerks shall be the same as the standard of performance for job retention. In contrast,

the language of the above-quoted regulation requires that a performance level sufficient to receive a within-grade increase must exceed the level which is merely adequate for job retention. Without passing upon whether proposals related to acceptable levels of competence for the receipt of within-grade increases under 5 U.S.C. § 5335 are otherwise within the duty to bargain under section 7117, subsection B of the Union's proposal, insofar as it provides for a performance level for the granting of within-grade increases which does not exceed the standard adequate for job retention in the circumstances of this case, is inconsistent with Government-wide regulation.

In conclusion, for the reasons set forth above, the Union's proposal is found to be inconsistent with Federal law and Government-wide regulation and, thus, is outside the scope of bargaining established in section 7117(a)(1) of the Statute. Accordingly, the Agency's allegation is sustained.

Issued, Washington, D.C., July 31, 1980

/s/ Ronald W. Haughton
RONALD W. HAUGHTON
Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III
Member

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE
Member

FEDERAL LABOR RELATIONS AUTHORITY

3 FLRA No. 120

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-NG-177-2
177-3
177-4
177-5

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 32
(*Labor Organization*)

and

OFFICE OF PERSONNEL MANAGEMENT, WASHINGTON, D.C.
(*Activity*)

DECISION ON NEGOTIABILITY ISSUES

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 *et seq.*).[1]

Union Proposals 2 and 3

Section . A performance standard is a statement of the expressed level of achievement in terms of the quality, quantity, timeliness, etc., required for the performance of an element of an employee's job. [All

[1] Pursuant to the requirement to expedite proceedings to the extent practicable contained in section 7117(c)(6) of the Statute and section 2424.10 of the Authority's rules and regulations, 5 CFR 2424.10, Union Proposal 1 (O-NG-177-1) in the above-captioned matter has been severed from the proposals considered herein and will be considered separately.

of this proposal is alleged to be outside the duty to bargain.]

Section 5. All performance elements identified for an employee's position, specifying those which are critical, will be communicated to the employee in writing at the beginning of each appraisal period. *A critical element is one which is so important that inadequate performance of it outweighs acceptable or better performance in other aspects of the job.* [In section 5, only the underscored sentence has been alleged to be outside the duty to bargain.]

Question Here Before the Authority

The question presented is whether the Union's proposals are, as alleged by the Agency, inconsistent with Government-wide rules or regulations and therefore excluded from the obligation to bargain under section 7117(a)(1) of the Statute.

Opinion

Conclusion: The proposals are not inconsistent with Government-wide rules or regulations and, therefore, are not excluded from the obligation to bargain by reason of section 7117(a)(1) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 5 CFR 2424.10, the Agency's allegation that the disputed proposals are not within the duty to bargain is set aside.[2]

Reasons: The Agency alleges the proposals are excluded from the duty to bargain by section 7117(a)(1) of the Statute, which provides as follows:

---

[2] In deciding that the proposals are within the duty to bargain, the Authority makes no judgment as to their merits.

§ 7117. *Duty to bargain in good faith; compelling need; duty to consult*

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

The Agency contends regulations concerning performance appraisal are Government-wide regulations, and "as such, management is prohibited from negotiating a definition which would differ from that promulgated in the government-wide regulation." Specifically, the Agency contends since the regulations at 5 CFR 430.202(d) and (e) define, respectively, the terms "performance standard" and "critical element," any proposed definitions which differ from the regulatory language would contravene the regulation and, therefore, would not be within the duty to bargain. The Union, however, contends, in order for a proposal to be outside the duty to bargain, the proposal must be inconsistent with the regulations "in the sense of being mutually repugnant or contradictory." Thus, the Union argues, use of the proposed definitions would not result in noncompliance with the regulations. Finally, the Union notes that other language tentatively agreed upon between the parties would provide:

> In the administration of all matters covered by the agreement, officials and employees are governed by the provisions of existing and future laws and regulations . . . .

The Union here concludes the proposal cannot be read without reference to the applicable Office of Personnel Management (OPM) regulations and must be interpreted and applied consistently with those regulations.

Section 4302 of the Civil Service Reform Act (CSRA)[3] requires each agency to develop one or more performance appraisal systems and states the basic requirements of such systems. The OPM regulations issued pursuant to

---

[3] Section 4302 of the CSRA (5 U.S.C. § 4302) provides as follows:

§ 4302. *Establishment of performance appraisal systems*

(a) Each agency shall develop one or more performance appraisal systems which—

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees;

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

this section, which are relied upon by the Agency, provide in pertinent part as follows:

> (d) "Performance standards" are the expressed measure of the level of achievement established by management for the duties and responsibilities of a position or group of positions. Performance standards may include, but are not limited to, elements such as quantity, quality, and timeliness.
>
> (e) "Critical element" means a component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action and denial of a within-grade increase, and may be the basis for removing or reducing the grade level of that employee. Such action may be taken without regard to performance on other components of the job.

Assuming, without deciding, that the regulations at 5 CFR 430.202 are Government-wide regulations, the proposals here are not inconsistent with the cited regulations in that they are not incompatible or irreconcilable with those regulations. The only difference between the Union's proposed definition of the term "performance standard" and the definition set forth at 5 CFR 430.202(d) is that the regulatory definition indicates that such standards are to be "established by management," while the proposal here is silent in that respect. In that regard, however, the Authority held in *National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt*, 3 FLRA No. *119* (1980), decided this date, that management retains the right under section 7106(a)(2)(A) and (B) of the Statute to establish performance standards. Similarly, the regulation at 5 CFR 430.202(e) regarding critical elements refers to certain required "remedial action" for substandard performance, while the Union's proposed section 5 is silent in that respect. In all cases regarding remedial action, the regula-

tion would govern; therefore, management's right to take such action is protected.

Insofar as the proposals here are silent with respect to the matters set forth above, and the record does not indicate that the Union intends that the proposals be applied in any manner inconsistent with law and regulation, the proposals are not inconsistent with the regulations cited by the Agency here. In any event, the Statute, as applied by the Authority, and the applicable regulation would govern the matters not addressed by the proposals. Accordingly, since the proposals here are thus not inconsistent with the regulations cited by the Agency, the Agency's allegation that the disputed proposals are not within the duty to bargain must be set aside.

Union Proposal 4

Section 6. Employees shall participate in establishing performance standards through collective bargaining, to the extent this matter is within the scope of bargaining.

Question Here Before the Authority

The question presented is whether the Union's proposal is a matter within the duty to bargain under the Statute or, as alleged by the Agency, violates section 7106 [4] of the Statute.

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[4] 5 U.S.C. § 7106 pertinently provides:

§ 7106. *Management rights*

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

* * * * *

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in

Opinion

Conclusion: The proposal violates section 7106(a)(2)(A) and (B) of the Statute insofar as it requires negotiation on the establishment and content of performance standards. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 5 CFR 2424.10, the Agency's allegation that the proposal is not within the duty to bargain is sustained.

Reasons: Both the Union and the Agency have interpreted this proposal as requiring collective bargaining concerning the establishment and substance of performance standards and the proposal is so interpreted for the purpose of this decision. Thus, the substantive issue presented here is identical to that addressed by the Authority in *Bureau of the Public Debt*, 3 FLRA No. *119* (1980), *supra*. In that decision, the Authority held that a proposal to establish a particular critical element and performance standard would directly interfere with the exercise of management's rights to direct employees and to assign work under section 7106(a)(2)(A) and (B) of the Statute and, therefore, was not within the duty to bargain. Since the proposal here would likewise require negotiations concerning the establishment and content of performance standards, it bears no dispositive difference from the proposal held not to be within the duty to bargain in the *Bureau of the Public Debt* case. Therefore, for the reasons fully set forth in *Bureau of the Public Debt*, the proposal here in dispute must also be held not to be within the duty to bargain. It is emphasized, however, as stated in *Bureau of the Public Debt* (at page 2 of the decision) that:

---

grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted[.]

. . . consistent with the intent of Congress as expressed in section 7101 of the Statute that employees participate through labor organizations of their own choosing in decisions which affect them, and other sections discussed hereinafter, the agency's right to identify critical elements and establish performance standards under section 7106(a) is subject to certain rights of a labor organization under the Statute. Specifically, under section 7117, as to the units of exclusive recognition, it is within the duty of the agency to bargain, consistent with law and regulation, on aspects of performance appraisal systems other than identification of critical elements and content of performance standards. The duty to bargain extends to, among other matters, the form of the employee participation in the establishment of performance standards required under section 4302 of the Civil Service Reform Act (CSRA). In this connection, section 4302 in its reference to participation of employees in establishing performance standards refers to all employees, whether represented or unrepresented.

Furthermore, section 7106(a) is subject to section 7106(b). Under section 7106(b)(2), an agency has the duty to bargain on procedures which management officials will observe in the development and implementation of performance standards and critical elements; and, under section 7106(b)(3), on appropriate arrangements for employees adversely affected by the application of performance standards to them. In addition, under section 7114 of the Statute, the agency must afford an exclusive representative the opportunity to be present at any formal discussion between an agency representative and a unit employee regarding the establishment or the implementation of performance standards and critical elements and, when requested, at any investigatory interview of a unit employee who reasonably believes

that the examination may result in discipline for unacceptable performance under section 4303 of the CSRA. Finally, the right of an agency under section 7106(a) to identify critical elements and establish performance standards is subject to the right of an employee against whom disciplinary action has been taken. The employee has a right to challenge such action under the appellate procedures of section 7701 of the CSRA or under a negotiated grievance procedure pursuant to section 7121 of the Statute.

Thus, in the instant case, the Agency's right to identify critical elements and establish performance standards is subject to the right of a labor organization to negotiate on significant aspects of performance appraisal systems, including the form of the employee participation in the establishment of performance standards. Furthermore, management has an obligation to negotiate procedures and appropriate arrangements for employees adversely affected by management's establishing performance standards. In addition, an exclusive representative must be given the opportunity to be represented at certain meetings between management and employees relating to the development and implementation of performance appraisal systems and, when requested, at any investigatory interview when a unit employee believes that the examination may result in discipline for unacceptable performance. Finally, an employee against whom disciplinary action has been taken for unacceptable performance has a right to challenge under appellate procedures or a negotiated grievance procedure the action taken. However, insofar as the proposal here as interpreted by the parties requires bargaining over the content of performance standards, it is outside the duty to bargain, and the Agency's allegation must be sustained.

Union Proposal 5

Section . All performance standards will be fair and equitable and consistent with the classification

standards for the job. An employee who believes a standard does not meet the above criteria may grieve under the procedures in *Section* —.

Questions Here Before the Authority

The question presented is whether the Union's proposal as a whole is a matter within the duty to bargain under the Statute or, as alleged by the Agency, the proposal as a whole violates sections 7106(a)(2)(A) or 7106(b)(1). An additional question presented is whether, as further alleged by the Agency, the "classification standards" portion of the proposal violates 5 U.S.C. § 4302(b)(1) or whether that portion of the proposal violates section 7106(a)(2)(B) of the Statute.

Opinion

Conclusion: The proposal as a whole does not violate sections 7106(a)(2)(A) or 7106(b)(1) of the Statute. Further, the "classification standards" portion of the proposal does not violate section 4302(b)(1) of the CSRA or section 7106(a)(2)(B) of the Statute. Therefore, the proposal is within the duty to bargain under section 7117(a)(1). Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 5 CFR 2424.10, the Agency's allegations that the disputed proposal is not within the duty to bargain are set aside.[5]

Reasons: The Agency contends this proposal in its entirety would interfere with the exercise of certain management rights under section 7106(a) and (b)(1) of the Statute. More particularly, the Agency argues the proposal would interfere with its right to direct employees under section 7106(a)(2)(A) of the Statute. Essentially, the Agency contends the "fair and equitable" portion of the proposal here would prevent the Agency from

[5] In deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

exercising its discretion in establishing performance standards and might ultimately permit a third party to establish such standards in dergoation of its right to direct employees. The Agency also contends generally that the proposal here would interfere with its right to discipline employees under section 7106(a)(2)(A) because the proposal would severely circumscribe management's right to take action against an employee for poor performance. The Agency also argues generally that the proposal as a whole would interfere with its right under section 7106(b)(1) to determine the numbers, types, and grades of employees.

The Agency makes several additional arguments that the portion of the proposal which would require that "performance standards will be . . . consistent with the classification standards for the job" is excluded from the duty to bargain because it is inconsistent with section 4302(b)(1) of the CSRA regarding establishment of performance appraisal systems, and violates the right to assign work under section 7106(a)(2)(B) of the Statute. The Agency argues in essence that, since section 4302(b)(1) requires performance standards to be related to the job in question, the Union's proposal would violate that statutory requirement insofar as the proposal would relate performance standards to classification standards, rather than to the job. In addition, the Agency contends that this portion of the proposal would limit management's right to assign work under section 7106(a)(2)(B) of the Statute. Specifically, the Agency asserts that the proposal would interfere with management's right to assign work by restricting identification of critical elements and establishment of performance standards to only those limited duties explicitly set forth in the classification standards for the employee's position. Similarly, the Agency claims that management would be unable to assign and evaluate employee performance with respect to duties unrelated to an employee's classification, and questions whether any performance standard could be established for positions for which no classification standard exists.

Section 7106(a) and (b)(1) of the Statute recognizes certain management rights. However, section 7106(b)(2) and (3) of the Statute provides that management has a duty to bargain on procedures which management officials will observe in exercising those rights and on appropriate arrangements for employees adversely affected by the exercise of management's authority.[6] Insofar as it is consistent with the right of management ultimately to act with respect to its authority, Congress intended the parties to work out their differences on procedures and appropriate arrangements through negotiations.[7]

In *Bureau of the Public Debt*, 3 FLRA No. *119* (1980), *supra*, the Authority applied section 7106(a)(2)(A) and (B) of the Statute concerning the rights of management to direct employees and to assign work. Analyzing the purpose and function of critical elements and performance standards, the Authority found that the rights to direct employees and to assign work under the Statute include the authority to establish critical elements and

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[6] 5 U.S.C. § 7106(b)(2) and (3) provide:

§ 7106. *Management rights*

* * * *

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

* * * *

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

[7] *American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey*, 2 FLRA No. 16 (1979) at 2-4 of decision; and *National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California*, 2 FLRA No. 30 (1979) at 5-6 of decision.

performance standards. Accordingly, the Authority held that the proposal in that case which identified a critical element and established a quantitative performance standard for the job element was not within the duty to bargain. However, as was emphasized in that decision, an agency has a duty to bargain under section 7106(b)(3) of the Statute, on appropriate arrangements for employees adversely affected by management's exercise of its authority under section 7106(a), *i.e.*, actions taken under such standards. More particularly, the Authority stated that nothing in its decision would preclude an exclusive representative from negotiating criteria for the application of performance standards which management has established. Accordingly, insofar as the proposal here merely would establish a general, nonquantitative requirement by which the application of critical elements and performance standards established by management may subsequently be evaluated in a grievance by an employee who believes that he has been adversely affected by the application of management's performance standard to him, and the Authority so interprets the proposal for purposes of this decision, it is within the duty to bargain. Thus, an employee against whom management takes disciplinary action for unacceptable performance may, in a grievance of such action pursuant to section 7121(e) of the Statute raise the issue of whether the performance standards as applied to him meet the contractual requirements.[8] Such review by an arbitrator would not, contrary to the Agency's allegations, preclude the Agency from initially determining the content of the standard, nor would it result in the substitution of the arbitrator's judgment for that of the Agency and the setting of a new standard; it would simply determine if the standard established by

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[8] *Cf. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District Office*, 1 FLRA No. 102 (1979) (requirement that certain agency determinations "be made in a fair, objective and equitable manner" is within the duty to bargain under section 7106(b)(2)).

management as applied to the grievant complied with the "fair and equitable . . ." requirements of the parties' agreement.

Thus, the proposal here does not impose on the Agency a particular decision as to the quantity, quality, and timeliness of production or the establishing of priorities, or otherwise establish the content of performance standards in derogation of management's right to direct employees under section 7106(a)(2)(A) of the Statute. Similarly, since the proposal does not prevent management from establishing performance standards and taking action under section 4303 of the CSRA against employees based upon such standards, it does not prevent management from taking disciplinary action against an employee pursuant to section 7106(a)(2)(A). Further, the record does not disclose and it is not otherwise apparent in what manner the proposal is related to numbers, types, and grades of employees assigned to a tour of duty or organizational subdivision. Accordingly, the Agency's allegations that the proposal as a whole is not within the duty to bargain by reason of section 7106(a)(2)(A) or that the proposal is negotiable only at the election of the Agency under section 7106(b)(1) cannot be sustained.

With respect to the Agency's additional allegation that the portion of the proposal which states that "performance standards will be . . . consistent with the classification standards for the job" is inconsistent with section 4302 of the CSRA, the Union expressly concedes that "performance standards must be ultimately based on the actual duties properly assigned the employees." Moreover, with respect to the express terms of the proposal, *i.e.*, that performance standards must be "consistent with the classification standards for the job," the Union states as follows:

> All that the proposal means, is that, for example, when quality of work is grade-defining, the standard

> for quality at a given level must be at that level, and not at a higher or lower level . . . . Under the proposal, classification standards only come into play to the extent they are "for the job."

Thus, under the Union's interpretation of its proposed language, the Union does not in any manner seek to bargain over policies, practices and matters relating to the classification of any position. The sole and limited effect of the Union's proposal as interpreted by the Union, which interpretation is consistent with the language of the proposal and is adopted for purposes of this decision, is as follows: In the rare instance where an applicable classification standard uses a quantitative or qualitative performance criterion to distinguish among grade levels, the performance standard established should reflect this distinction. That is, under this proposal, where such a classification standard is applicable, an employee could grieve the application of a performance standard with respect to any task assigned to him if that performance standard reflected a level of achievement different from the level specified for the grade to which the employee's position is classified. In essence, the "classification standards" portion of the proposal merely constitutes a specific aspect of the "fair and equitable" requirement of the proposal under which the application of performance standards may be reviewed by an arbitrator. It has a limited effect as just stated in only applying in those rare instances where quantitative or qualitative performance criteria are used in a classification standard to distinguish among grade levels. Thus, as the Union expressly states, the proposal does not prevent the Agency from establishing, pursuant to section 4302(b)(1), performance standards related to the job performed by the employee. Accordingly, the proposal here does not in any manner seek to negotiate over classification matters or the substance of performance standards, nor is it inconsistent with section 4302 as alleged by the Agency.

Further, as noted above, the Agency has alleged that the proposal would interfere with its right to assign work under section 7106(a)(2)(B) of the Statute. Specifically, the Agency contends that this right would be infringed upon in three respects. That is, the Agency contends it would be unable to assign duties not prescribed in the classification standards, it would be unable to assign duties unrelated to those standards, and it would be unable to establish performance standards where no classification standards are applicable to the position or to any particular duties thereof. None of these arguments can be sustained for the same reason, which is that the proposal on its face and as interpreted by the Union does not in any manner limit the assignment of work or the scope of duties upon which an employee can be evaluated. Thus, without regard to whether the duties assigned to an employee are stated in or are unrelated to the classification standards applicable to the employee's job, or whether there is any classification standard applicable to the employee's job, the proposal does not conflict with management's right to assign to an employee any duties and to establish performance standards and critical elements with respect to any one of them. Accordingly, the Agency's allegation that the proposal would interfere with its right to assign work under section 7106(a)(2)(B) of the Statute must be set aside.

Based upon the foregoing, the proposal is within the duty to bargain under section 7106(b)(3) of the Statute as an appropriate arrangement for employees adversely affected by management's authority under the Statute to direct employees and assign work through the establishment of performance standards and to discipline employees for unacceptable performance.

Issued, Washington, D.C., July 31, 1980

/s/ Ronald W. Haughton
RONALD W. HAUGHTON
Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III
Member

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE
Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX F

THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

(Chapter 71 of Title 5 of the U.S. Code)

"Subpart F—Labor-Management and Employee Relations
"Chapter 71—Labor-Management Relations

"SUBCHAPTER I—GENERAL PROVISIONS

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"7102. Employees' rights.
"7103. Definitions; application.
"7104. Federal Labor Relations Authority.
"7105. Powers and duties of the Authority.
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"SUBCHAPTER III—GRIEVANCES, APPEALS, AND REVIEW

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"7121. Grievance procedures.

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"7135. Continuation of existing laws, recognitions, agreements, and procedures.

"SUBCHAPTER I—GENERAL PROVISIONS

"§ 7101. Findings and purpose

"(a) The Congress finds that—

"(1) Experience in both private and public employment indicates that the statutory protec-

tion of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

"(A) safeguards the public interest,

"(B) contributes to the effective conduct of public business, and

"(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

"(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

"(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

"§ 7102. Employees' rights

"Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise pro-

vided under this chapter, such right includes the right—

"(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

"(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

"§ 7103. Definitions; application

"(a) For the purpose of this chapter—

"(1) 'person' means an individual, labor organization, or agency;

"(2) 'employee' means an individual—

"(A) employed in any agency; or

"(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determinded under regulations prescribed by the Federal Labor Relations Authority;

but does not include—

"(i) an alien or noncitizen of the United States who occupies a position outside the United States;

"(ii) a member of the uniformed services;

"(iii) a supervisor or a management official;

"(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the Agency for International Development, or the International Communication Agency; or

"(v) any person who participates in a strike in violation of section 7311 of this title;

"(3) 'agency' means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Veterans' Administration), the Library of Congress, and the Government Printing Office, but does not include—

"(A) the General Accounting Office;

"(B) the Federal Bureau of Investigation;

"(C) the Ceneral Intelligence Agency;

"(D) the National Security Agency;

"(E) the Tennessee Valley Authority;

"(F) the Federal Labor Relations Authority;
or

"(G) the Federal Service Impasses Panel;

"(4) 'labor organization' means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an

agency concerning grievances and conditions of employment, but does not include—

"(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

"(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

"(C) an organization sponsored by an agency; or

"(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

"(5) 'dues' means dues, fees, and assessments;

"(6) 'Authority' means the Federal Labor Relations Authority described in section 7104(a) of this title;

"(7) 'Panel' means the Federal Service Impasses Panel described in section 7119(c) of this title;

"(8) 'collective bargaining agreement' means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

"(9) 'grievance' means any complaint—

"(A) by any employee concerning any matter relating to the employment of the employee;

"(B) by any labor organization concerning any matter relating to the employment of any employee; or

"(C) by any employee, labor organization, or agency concerning—

"(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

"(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

"(10) 'supervisor' means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority;

"(11) 'management official' means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

"(12) 'collective bargaining' means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit

in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

"(13) 'confidential employee' means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

"(14) 'conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

"(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

"(B) relating to the classification of any position; or

"(C) to the extent such matters are specifically provided for by Federal statute;

"(15) 'professional employee' means—

"(A) an employee engaged in the performance of work—

"(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual

instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

"(ii) requiring the consistent exercise of discretion and judgment in its performance;

"(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

"(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

"(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

"(16) 'exclusive representative' means any labor organization which—

"(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

"(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit—

"(i) on the basis of an election, or

"(ii) on any basis other than an election,

and continues to be so recognized in accordance with the provisions of this chapter;

"(17) 'firefighter' means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

"(18) 'United States' means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

"(b) (1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that—

"(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

"(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

"(2) The President may issue an order suspending any provision of this chapter with

respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

"§ 7104. Federal Labor Relations Authority

"(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

"(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority.

"(c)(1) One of the original members of the Authority shall be appointed for a term of 1 year, one for a term of 3 years, and the Chairman for a term of 5 years. Thereafter, each member shall be appointed for a term of 5 years.

"(2) Notwithstanding paragraph (1) of this subsection, the term of any member shall not expire before the earlier of—

"(A) the date on which the member's successor takes office, or

"(B) the last day of the Congress beginning after the date on which the member's term of office would (but for this subparagraph) expire.

An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced.

"(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

"(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and the decisions it has rendered.

"(f)(1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

"(2) The General Counsel may—

"(A) investigate alleged unfair labor practices under this chapter,

"(B) file and prosecute complaints under this chapter, and

"(C) exercise such other powers of the Authority as the Authority may prescribe.

"(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

"§ 7105. Powers and duties of the Authority

"(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise pro-

vided, shall be responsible for carrying out the purpose of this chapter.

"(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

"(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

"(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

"(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

"(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

"(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

"(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

"(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

"(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

"(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

"(b) The Authority shall adopt an official seal which shall be judicially noticed.

"(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

"(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

"(e)(1) The Authority may delegate to any regional director its authority under this chapter—

"(A) to determine whether a group of employees is an appropriate unit;

"(B) to conduct investigations and to provide for hearings;

"(C) to determine whether a question of representation exists and to direct an election; and

"(D) to supervise or conduct secret ballot elections and certify the results thereof.

"(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

"(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of—

"(1) the date of the action; or

"(2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

"(g) In order to carry out its functions under this chapter, the Authority may—

"(1) hold meetings;

"(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

"(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

"(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

"(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

"§ 7106. Management rights

"(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

"(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

"(2) in accordance with applicable laws—

"(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

"(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

"(C) with respect to filling positions, to make selections for appointments from—

"(i) among properly ranked and certified candidates for promotion; or

"(ii) any other appropriate source; and

"(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

"(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

"(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

"(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

"(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

"SUBCHAPTER II—RIGHTS AND DUTIES OF AGENCIES AND LABOR ORGANIZATIONS

"§ 7111. Exclusive recognition of labor organizations

"(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

"(b) If a petition is filed with the Authority—

"(1) by any person alleging—

"(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, or

"(B) in the case of an appropriate unit for which there is an exclusive representative, that 30 percent of the employees in the unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit; or

"(2) by any person seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation;

the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot and shall certify the results thereof. An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held.

"(c) A labor organization which—

"(1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section;

"(2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit, or

"(3) has submitted other evidence that it is the exclusive representative of the employees involved;

may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition.

"(d) The Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election, which shall include rules allowing employees eligible to vote the opportunity to choose—

"(1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or

"(2) not to be represented by a labor organization.

In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

"(e) A labor organization seeking exclusive recognition shall submit to the Authority and the agency involved a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

"(f) Exclusive recognition shall not be accorded to a labor organization—

"(1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;

"(2) in the case of a petition filed pursuant to subsection (b) (1) (A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective bargaining by the labor organization seeking exclusive recognition;

"(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless—

"(A) the collective bargaining agreement has been in effect for more than 3 years, or

"(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement; or

"(4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

"(g) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation

for the purpose of a consent election in conformity with regulations and rules or decisions of the Authority.

"§ 7112. Determination of appropriate units for labor organization representation

"(a)(1) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of, the agency involved.

"(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—

"(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

"(2) a confidential employee;

"(3) an employee engaged in personnel work in other than a purely clerical capacity;

"(4) an employee engaged in administering the provisions of this chapter;

"(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

"(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

"(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

"(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization—

"(1) which represents other individuals to whom such provision applies; or

"(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

"(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

"§ 7113. National consultation rights

"(a)(1) If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis, a labor organization which is the exclusive representative of a substantial number of the employees of the agency, as determined in accordance with criteria prescribed by the Authority, shall be granted national consultation rights by the agency. National consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organiza-

tion's eligibility for, or continuation of, national consultation rights shall be subject to determination by the Authority.

"(b) (1) Any labor organization having national consultation rights in connection with any agency under subsection (a) of this section shall—

"(A) be informed of any substantive change in conditions of employment proposed by the agency, and

"(B) be permitted reasonable time to present its views and recommendations regarding the changes.

"(2) If any views or recommendations are presented under paragraph (1) of this subsection to an agency by any labor organization—

"(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

"(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

"(c) Nothing in this section shall be construed to limit the right of any agency or exclusive representative to engage in collective bargaining.

"§ 7114. Representation rights and duties

"(a) (1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the

unit it represents without discrimination and without regard to labor organization membership.

"(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

"(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

"(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

"(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

"(ii) the employee requests representation.

"(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

"(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

"(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—

"(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

"(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

"(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

"(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

"(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

"(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

"(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

"(A) which is normally maintained by the agency in the regular course of business;

"(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

"(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

"(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

"(c) (1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

"(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

"(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

"(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

"§ 7115. Allotments to representatives

"(a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the

unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

"(b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when—

"(1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or

"(2) the employee is suspended or expelled from membership in the exclusive representative.

"(c) (1) Subject to paragraph (2) of this subsection, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in an agency have membership in the labor organization, the Authority shall investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the agency shall have a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

"(2) (A) The provisions of paragraph (1) of this subsection shall not apply in the case of any appropriate unit for which there is an exclusive representative.

"(B) Any agreement under paragraph (1) of this subsection between a labor organization and an

agency with respect to an appropriate unit shall be null and void upon the certification of an exclusive representative of the unit.

"§ 7116. Unfair labor practices

"(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

"(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

"(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

"(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

"(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

"(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

"(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the

agreement was in effect before the date the rule or regulation was prescribed; or

"(8) to otherwise fail or refuse to comply with any provision of this chapter.

"(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

"(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

"(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

"(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

"(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

"(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

"(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an

agency in a labor-management dispute if such picketing interferes with an agency's operations, or

"(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

"(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

"(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

"(1) to meet reasonable occupational standards uniformly required for admission, or

"(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

"(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121 (e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance

procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

"(e) The expression of any personal view, argument, opinion or the making of any statement which—

"(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election.

"(2) corrects the record with respect to any false or misleading statement made by any person, or

"(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

"§ 7117. Duty to bargain in good faith; compelling need; duty to consult

"(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

"(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to mat-

ters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

"(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

"(b) (1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a) (3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

"(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

"(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

"(B) the Authority determines that a compelling need for a rule or regulation does not exist.

"(3) A hearing may be held, in the discretion of the Authority, before a determination is made under

this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

"(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

"(c) (1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

"(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

"(A) filing a petition with the Authority; and

"(B) furnishing a copy of the petition to the head of the agency.

"(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2) (B) of this subsection, the agency shall—

"(A) file with the Authority a statement—

"(i) withdrawing the allegation; or

"(ii) setting forth in full its reasons supporting the allegation; and

"(B) furnish a copy of such statement to the exclusive representative.

"(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3) (B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

"(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

"(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

"(d) (1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

"(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

"(A) be informed of any substantive change in conditions of employment proposed by the agency, and

"(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

"(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

"(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

"(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

"§ 7118. Prevention of unfair labor practices

"(a) (1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

"(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

"(A) of the charge;

"(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

"(C) of the time and place fixed for the hearing.

"(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person

or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

"(4) (A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

"(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

"(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

"(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

"(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

"(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II

of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

"(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

"(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

"(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

"(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

"(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of

the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

"(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

"(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

"§ 7119. Negotiation impasses; Federal Service Impasses Panel

"(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.

"(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

"(1) either party may request the Federal Service Impasses Panel to consider the matter, or

"(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

"(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

"(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

"(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

"(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is en-

titled to travel expenses as provided under section 5703 of this title.

"(5) (A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either—

"(i) recommend to the parties procedures for the resolution of the impasse; or

"(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

"(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

"(i) hold hearings;

"(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

"(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

"(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

"§ 7120. Standards of conduct for labor organizations

"(a) An agency shall only accord recognition to a labor organization that is free from corrupt influences and influences opposed to basic democratic

principles. Except as provided in subsection (b) of this section, an organization is not required to prove that it is free from such influences if it is subject to governing requirements adopted by the organization or by a national or international labor organization or federation of labor organizations with which it is affiliated, or in which it participates, containing explicit and detailed provisions to which it subscribes calling for—

"(1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings;

"(2) the exclusion from office in the organization of persons affiliated with communist or other totalitarian movements and persons identified with corrupt influences;

"(3) the prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and

"(4) the maintenance of fiscal integrity in the conduct of the affairs of the organization, including provisions for accounting and financial controls and regular financial reports or summaries to be made available to members.

"(b) Notwithstanding the fact that a labor organization has adopted or subscribed to standards of conduct as provided in subsection (a) of this section, the organization is required to furnish evidence of its freedom from corrupt influences or influences

opposed to basic democratic principles if there is reasonable cause to believe that—

"(1) the organization has been suspended or expelled from, or is subject to other sanction, by a parent labor organization, or federation of organizations with which it had been affiliated, because it has demonstrated an unwillingness or inability to comply with governing requirements comparable in purpose to those required by subsection (a) of this section; or

"(2) the organization is in fact subject to influences that would preclude recognition under this chapter.

"(c) A labor organization which has or seeks recognition as a representative of employees under this chapter shall file financial and other reports with the Assistant Secretary of Labor for Labor Management Relations, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

"(d) The Assistant Secretary shall prescribe such regulations as are necessary to carry out the purposes of this section. Such regulations shall conform generally to the principles applied to labor organizations in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary. In any matter arising under this section, the Assistant Secretary may require a labor organization to cease and desist from violations of this section and require it to take such actions as he considers appropriate to carry out the policies of this section.

"(e) This chapter does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by a management official, a supervisor, or a confidential employee, except as specifically provided in this chap-

ter, or by an employee if the participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.

"(f) In the case of any labor organization which by omission or commission has willfully and intentionally, with regard to any strike, work stoppage, or slowdown, violated section 7116(b)(7) of this title, the Authority shall, upon an appropriate finding by the Authority of such violation—

"(1) revoke the exclusive recognition status of the labor organization, which shall then immediately cease to be legally entitled and obligated to represent employees in the unit; or

"(2) take any other appropriate disciplinary action.

"SUBCHAPTER III—GRIEVANCES, APPEALS, AND REVIEW

"§ 7121. Grievance procedures

"(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

"(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

"(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

"(1) be fair and simple,

"(2) provide for expeditious processing, and

"(3) include procedures that—

"(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

"(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

"(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

"(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

"(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

"(2) retirement, life insurance or health insurance;

"(3) a suspension or removal under section 7532 of this title;

"(4) any examination, certification, or appointment; or

"(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

"(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit System Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

"(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be

deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

"(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

"(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

"§ 7122. Exceptions to arbitral awards

"(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

"(1) because it is contrary to any law, rule, or regulation; or

"(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

"(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date of such award, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

"§ 7123. Judicial review; enforcement

"(a) Any person aggrieved by any final order of the Authority other than an order under—

"(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

"(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

"(b) The Authority may petition any appropriate United States court of appeals for the enforcement

of any order of the Authority and for appropriate temporary relief or restraining order.

"(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its find-

ings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

"(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

"SUBCHAPTER IV—ADMINISTRATIVE AND OTHER PROVISIONS

"§ 7131. Official time

"(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

"(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

"(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

"(d) Except as provided in the preceding subsections of this section—

"(1) any employee representing an exclusive representative, or

"(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

"§ 7132. Subpenas

"(a) Any member of the Authority, the General Counsel, or the Panel, any administrative law judge appointed by the Authority under section 3105 of this title, and any employee of the Authority designated by the Authority may—

"(1) issue subpenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States; and

"(2) administer oaths, take or order the taking of depositions, order responses to written interrogatories, examine witnesses, and receive evidence.

No subpena shall be issued under this section which requires the disclosure of intramanagement guidance, advice, counsel, or training within an agency or between an agency and the Office of Personnel Management.

"(b) In the case of contumacy or failure to obey a subpena issued under subsection (a)(1) of this section, the United States district court for the judicial district in which the person to whom the subpena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

"(c) Witnesses (whether appearing voluntarily or under subpena) shall be paid the same fee and mile-

age allowances which are paid subpenaed witnesses in the courts of the United States.

"§ 7133. Compilation and publication of data

"(a) The Authority shall maintain a file of its proceedings and copies of all available agreements and arbitration decisions, and shall publish the texts of its decisions and the actions taken by the Panel under section 7119 of this title.

"(b) All files maintained under subsection (a) of this section shall be open to inspection and reproduction in accordance with the provisions of sections 552 and 552a of this title.

"§ 7134. Regulations

"The Authority, the General Counsel, the Federal Mediation and Conciliation Service, the Assistant Secretary of Labor for Labor Management Relations, and the Panel shall each prescribe rules and regulations to carry out the provisions of this chapter applicable to each of them, respectively. Provisions of subchapter II of chapter 5 of this title shall be applicable to the issuance, revision, or repeal of any such rule or regulation.

"§ 7135. Continuation of existing laws, recognitions, agreements, and procedures

"(a) Nothing contained in this chapter shall preclude—

"(1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter; or

"(2) the renewal, continuation, or initial according of recognition for units of management

officials or supervisors represented by labor organizations which historically or traditionally represent management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the effective date of this chapter.

"(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter."

APPENDIX G

TITLE 5 OF THE U.S. CODE

CHAPTER 43—PERFORMANCE APPRAISAL

Subchapter I—General Provisions

SEC.

4301. Definitions.
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Subchapter I—General Provisions

§ 4301. Definitions

For the purpose of this subchapter—

(1) "agency" means—

(A) an Executive agency;

(B) the Administrative Office of the United States Courts; and

(C) the Government Printing Office; but does not include—

(i) a Government corporation;

(ii) the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, or any Executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office;

(2) "employee" means an individual employed in or under an agency, but does not include—

(A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(B) an individual in the Foreign Service of the United States;

(C) a physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Veterans' Administration whose pay is fixed under chapter 73 of title 38;

(D) an administrative law judge appointed under section 3105 of this title;

(E) an individual in the Senior Executive Service;

(F) an individual appointed by the President; or

(G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter by regulations of the Office of Personnel Management; and

(3) "unacceptable performance" means performance of an employee which fails to meet established

performance standards in one or more critical elements of such employee's position.

§ 4302. Establishment of performance appraisal systems

(a) Each agency shall develop one or more performance appraisal systems which—

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees;

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

§ 4303. Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee

who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is a preference eligible or is in the competitive service and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title.

(f) This section does not apply to—

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

§ 4304. Responsibilities of the Office of Personnel Management

(a) The Office of Personnel Management shall make technical assistance available to agencies in the development of performance appraisal systems.

(b)(1) The Office shall review each performance appraisal system developed by any agency under this section and determine whether the performance appraisal system meets the requirements of this subchapter.

(2) The Comptroller General shall from time to time review on a selected basis performance appraisal systems established under this subchapter to determine the extent to which any such system meets the requirements of this subchapter and shall periodically report its findings to the Office and to the Congress.

(3) If the Office determines that a system does not meet the requirements of this subchapter (including regulations prescribed under section 4305), the Office shall direct the agency to implement an appropriate system or to

correct operations under the system, and any such agency shall take any action so required.

§ 4305. Regulations

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter.

APPENDIX H

TITLE 5 OF THE CODE OF FEDERAL REGULATIONS

PART 430—PERFORMANCE APPRAISAL

Subpart A—Statutory Provisions

Sec.

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430.302 Interim assignment of performance ratings.

AUTHORITY: 5 U.SC. 4305.

SOURCE: 44 FR 45589, Aug. 3, 1979, unless otherwise noted.

Subpart A—Statutory Provisions

§ 430.101 Statutory provisions.

This subpart sets forth for the benefit of the user the provisions of subchapter I of chapter 43 of title 5, United States Code, relating to establishment of performance appraisal systems and appraisals of employee's performance.

(a) *Definitions.* 5 U.S.C. 4301 contains the following definitions:

For the purpose of this subchapter—

(1) "Agency" means—

(A) An Executive agency;

(B) The Administrative Office of the United States Courts; and

(C) The Government Printing Office; but does not include—

(i) A Government corporation;

(ii) The Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, or any Executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) The General Accounting Office.

(2) "Employee" means an individual employed in or under an agency, but does not include—

(A) An employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(B) An individual in the Foreign Service of the United States;

(C) A physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Veterans Administration whose pay is fixed under chapter 73 of title 38;

(D) An administrative law judge appointed under section 3105 of this title;

(E) An individual in the Senior Executive Service;

(F) An individual appointed by the President; or

(G) An individual occupying a position not in the competitive service excluded from coverage of this subchapter by regulations of the Office of Personnel Management; and

(3) "Unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

(b) *Establishment of performance appraisal systems.* 5 U.S.C. 4302 provides:

(a) Each agency shall develop one or more performance appraisal systems which—

(1) Provide for periodic appraisals of job performance of employees;

(2) Encourage employee participation in establishing performance standards; and

(3) Use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees;

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—

(1) Establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) As soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) Evaluating each employee during the appraisal period on such standards;

(4) Recognizing and rewarding employees whose performance so warrants;

(5) Assisting employees in improving unacceptable performance; and

(6) Reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

(c) *Responsibilities of the Office of Personnel Management*, 5 U.S.C. 4304 provides:

(a) The Office of Personnel Management shall make technical assistance available to agencies in the development of performance appraisal systems.

(b) (1) The Office shall review each performance appraisal system developed by any agency under this section and determine whether the performance appraisal system meets the requirements of this subchapter.

(2) The Comptroller General shall from time to time review on a selected basis performance appraisal systems established under this subchapter to determine the extent to which any such system meets the requirements of this subchapter and shall periodically report its findings to the Office and to the Congress.

(3) If the Office determines that a system does not meet the requirements of this subchapter (including regulations prescribed under section 4305), the Office shall direct the agency to implement an appropriate system or to correct operations under the system, and any such agency shall take any action so required.

(d) *Regulations.* 5 U.S.C. 4305 provides:

"The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter."

Subpart B—Regulatory Requirements of the Office of Personnel Management

§ 430.201 Coverage.

(a) *Employees and agencies covered by statute.* (1) 5 U.S.C. 4301(1) lists agencies covered by this part.

(2) 5 U.S.C. 4301(2) lists employees covered by statute by this part.

(b) *Statutory Exclusions.* This subpart does not apply to agencies or employees excluded by 5 U.S.C. 4301(1) and (2), the United States Postal Service and the Postal Rate Commission.

(c) *Administrative exclusions.* The Office may exclude any position or group of positions in the excepted service under the authority of 5 U.S.C. 4301(2)(G). The following are excluded:

(1) Positions in Schedule C of 5 CFR, Part 213.

(2) Positions filled by Noncareer Executive Assignments under 5 CFR, Part 305.

(3) Positions for which employment is not reasonably expected to exceed 120 days in a consecutive 12-month period.

(d) *Agency requests for exclusions.* Heads of agencies or their designees may request the Director of the Office of Personnel Management to exclude positions in the excepted service. The request must be in writing, explaining why the exclusion would be in the interest of good administration.

§ 430.202 Definitions.

In this part, terms are defined as follows—

(a) "Appraisal system" means a performance appraisal system established by an agency or component of an agency under subchapter I of chapter 43 of title 5,

U.S.C. and Subpart B of this part which provides for establishment of performance standards, identification of critical elements, communication of standards, and critical elements to employees, establishment of methods and procedures to appraise performance against established standards, and appropriate use of appraisal information in making personnel decisions.

(b) "Performance" means an employee's accomplishment of assigned duties and responsibilities.

(c) "Appraisal" means comparison of an employee's performance of duties and responsibilities with performance standards.

(d) "Performance standards" are the expressed measure of the level of achievement established by management for the duties and responsibilities of a position or group of positions. Performance standards may include, but are not limited to, elements such as quantity, quality, and timeliness.

(e) "Critical element" means a component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action and denial of a within-grade increase, and may be the basis for removing or reducing the grade level of that employee. Such action may be taken without regard to performance on other components of the job.

(f) "Appraisal period" means the period of time established by an appraisal system for which an employee's performance will be reviewed.

§ 430.203 The performance appraisal process.

(a) As required by 5 U.S.C. 4302(a), each agency shall establish one or more appraisal systems for appraising the work performance of employees during an appraisal period.

(b) 5 U.S.C. 4302(a) and (b) require that each appraisal system shall provide for establishing performance standards based on the requirements of employees' positions, communicating the standards of performance and the critical elements of the position at the beginning of each appraisal period, and appraising employees based on a comparison of performance with the standards established for the appraisal period. An agency shall encourage participation of employees in establishing performance standards.

(c) Performance standards and critical elements must be consistent with the duties and responsibilities contained in employee's position descriptions.

(d) An appraisal system shall not permit any preestablished distributions of expected levels of performance (such as a requirement to rate on a bell curve) that interfere with appraisal of actual performance against standards.

(e) 5 U.S.C. 4302 requires that each appraisal system shall provide for periodic appraisals of performance. Employees shall generally be appraised on at least an annual basis. Agencies may provide for longer appraisal periods when duties and responsibilities of a position or the tour of duty of a position so warrant.

(f) Critical elements and performance standards shall be in writing.

(g) Periodic appraisals shall be in writing and shall be provided to the employee.

(h) A system shall provide for obtaining information about performance of employees detailed or temporarily assigned to different positions when assignments are of sufficient duration to provide information about performance, and agencies shall give appropriate consideration to this information in making personnel decisions.

(i) Performance appraisals shall be used:

(1) To provide employees with information on their performance and how it may be improved.

(2) As a basis for decisions to grant awards; grant or withhold pay increases, i.e., within-grade increases, step increases, and quality step increases; grant merit pay; reassign; promote; train; retain in reduction in force; and reduce in grade or remove.

§ 430.204 Appraisal system documentation.

(a) Each appraisal system must include statements of:

(1) The employees that it covers;

(2) The method or procedure by which performance standards and critical elements are established and employees are appraised;

(3) The ways in which employees are advised of performance standards and critical elements, are kept informed of their performance, and are notified of their appraisals;

(4) The supervisory officials, by definition or category, who are responsible for appraising performance and, if applicable, reviewing or approving appraisals;

(5) The records to be kept and the uses of those records; and

(6) The manner in which appraisals are used as a basis for personnel decisions, or reference to where this information may be found.

§ 430.205 Training and evaluation.

To assure that the requirements of the law will be effectively implemented, agencies must provide appropriate training and information to supervisors and employees on the appraisal process, and must establish methods and procedures to evaluate periodically the effectiveness of their appraisal system(s) and to improve the system(s).

§ 430.206 OPM review of appraisal systems.

(a) Agencies must submit proposed systems to the Office of Personnel Management for review as conforming to the requirements of this part. Submissions may either be agency-wide appraisal systems or requirements which the systems of subordinate organizations must meet. The Office will normally review these systems within 30 days.

(b) The Office will review the operation of appraisal systems and supporting documentation with respect to compliance with the requirements of this part, contribution to agency effectiveness and efficiency, and appropriate use of performance information in personnel decisions.

(c) As provided by 5 U.S.C. 4304(b)(3), if the Office determines that an agency system does not meet the requirements of this part, it shall direct the agency to implement an appropriate system or to correct operations under the system. The agency shall take any action so required.

Subpart C—Implementation and Interim Procedures

§ 430.301 Implementation of this part.

Each agency covered by subparts A and B of this part shall submit proposed appraisal systems to the Office for review on or before July 31, 1981. Each agency must implement an approved system or systems on or before October 1, 1981, and must inform all employees covered by this part of the performance standards and critical elements of their positions as soon as the system is approved, but, in no event, later than October 1, 1981. Nothing herein prohibits an agency from developing and implementing critical elements and standards for particular positions prior to the development and implementation of critical elements and standards for all positions within the agency. Once critical elements and standards are developed for particular positions, they may be used as a basis for agency action including reducing in grade

and removing employees. Critical elements and performance standards developed for particular positions prior to the establishment of a complete system must be reduced to writing and provided to the employee before an agency proposes to take an action based on these elements and standards.

§ 430.302 Interim assignment of performance ratings.

The requirement for and the system of assigning summary adjective performance ratings which were in effect on January 10, 1979, shall continue in effect until the agency implements an appraisal system which conforms to the provisions of this part.

Office-Supreme Court, U.S.
FILED
APR 19 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1144

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1968, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7101 *et seq.*, requires a federal agency to engage in collective bargaining over petitioner's proposals concerning union participation in development of employee performance standards and submission to arbitration of disputes with respect to such performance standards.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 691 F.2d 565. The decision and order of the Federal Labor Relations Authority (Pet. App. 44a-61a) is reported at 5 F.L.R.A. No. 14.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1982. The petition for a writ of certiorari was filed on January 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 1101 *et seq.*, are reprinted at Pet. App. 101a-160a.

STATEMENT

1. In the course of collective bargaining between the Department of Transportation, Saint Lawrence Seaway Development Corporation ("the agency") and petitioner, American Federation of Government Employees, AFL-CIO, Local 1968, a dispute developed concerning the negotiability of several of petitioner's proposals relating to a performance appraisal system for agency employees. The agency refused to bargain with respect to the italicized portions of the following proposals, on the basis that it considered them to be nonnegotiable (Pet. App. 4a-5a):

PROPOSAL III

Section 4. There shall be no secret studies bearing on performance appraisals. All studies conducted by the [employer] will be conducted on typical workers under normal working conditions. *The Union shall participate on an equal basis in the development or revisions of all measures of performance and studies including but not limited to selection of typical workers and conditions. If agreement cannot be reached, formal negotiations will be convened. Any impasses will be referred to the Federal Service Impasses Panel for resolution.*

PROPOSAL IV

Section 6. Any disputes under this Article may be resolved under the negotiated grievance procedure including but not limited to:

1. *Challenges to critical elements of position.*

2. *The measure of performance as set forth in performance standards.*

* * * * *

Petitioner brought the negotiability dispute before the Federal Labor Relations Authority ("FLRA"), the federal agency charged with implementing the provisions of the labor-management relations chapter of the Civil Service Reform Act of 1978, Title VII, 5 U.S.C. (Supp. V) 7101 *et seq.*, ("Labor-Management Act").[1] The FLRA held (Pet. App. 44a-61a) that the disputed portions of the bargaining proposals directly interfered with areas confided to management under 5 U.S.C. (Supp. V) 7106(a) and thus were outside the agency's statutory duty to bargain. The FLRA relied on its earlier decision in *National Treasury Employees Union* and *Department of the Treasury, Bureau of the Public Debt*, 3 F.L.R.A. 769 (1980), aff'd, 691 F.2d 553 (D.C. Cir. 1982).[2] In *Bureau of the Public Debt* the FLRA held that establishment of performance standards and identification of critical elements under an employee performance appraisal system are matters reserved to the agency by virtue of its reserved management rights under Section 7106(a) to direct employees and assign work.

Based on its holding in *Bureau of the Public Debt*, the FLRA found (Pet. App. 52a-53a) that petitioner's Proposal III was outside the scope of the agency's statutory bargaining obligation, since it envisioned bargaining to impasse on the content of performance standards and thus was inconsistent with management's rights to direct employees and assign work. Similarly, the FLRA determined (*id.* at 57a-58a) that the disputed portion of Proposal IV was non-

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[1]The FLRA has the statutory responsibility to resolve negotiability disputes that arise in the course of collective bargaining between an agency and an exclusive representative of its employees. 5 U.S.C. (Supp. V) 7105(a)(2)(E), 7117(c).

[2]The decision of the FLRA in *Bureau of the Public Debt* is reprinted at Pet. App. 62a-83a. The decision of the District of Columbia Circuit affirming the FLRA's decision is reprinted at Pet. App. 19a-43a.

negotiable because it would permit direct challenges to performance standards and critical job elements and would allow arbitrators to substitute their notions of proper standards and elements for those of management.

2. Petitioner filed a petition for review of the FLRA decision in the court of appeals, pursuant to 5 U.S.C. (Supp. V) 7123(a). The court affirmed (Pet. App. 1a-18a) the FLRA decision, relying on principles it had articulated in *Department of Defense* v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982), and in *National Treasury Employees Union* v. *FLRA*, 691 F.2d 553 (D.C. Cir. 1982). The court held, *inter alia*, that the FLRA had concluded correctly that Proposals III and IV were nonnegotiable, because they would restrict management's authority to establish performance standards and critical job elements, and thus would interfere with the agency's statutory prerogative to direct employees and assign work (Pet. App. 9a, 15a-17a).[3]

ARGUMENT

Petitioner contends that Title VII of the Civil Service Reform Act, 5 U.S.C. (Supp. V) 7101 *et seq.* (the "Labor-Management Act"), requires that a federal agency engage in collective bargaining over proposals under which petitioner would participate equally in development or revision of employee performance standards and disputes concerning such performance standards and critical job elements would be submitted to arbitration. The court of appeals rejected petitioner's contention, concluding that the FLRA had interpreted the statute in a reasonable manner in finding such proposals to be nonnegotiable. That decision,

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[3]The FLRA and the court of appeals also found nonnegotiable several other proposals that were the subject of dispute between petitioner and the agency. Petitioner does not now seek review with respect to those proposals (Pet. 3-4 n.2).

which is correct, does not conflict with the decision of any other court of appeals or with any decision of this Court. Therefore, further review is not warranted.

1. Petitioner contends (Pet. 11-22) that the language and legislative history of the Labor-Management Act support its view that federal agencies are required to negotiate concerning performance standards and critical job elements. However, both the FLRA and the court of appeals found persuasive indications to the contrary. The key provision of the Act, 5 U.S.C. (Supp. V) 7106(a), states that, subject to Subsection (b) of that Section, nothing in the Act shall affect the authority of an agency, *inter alia*, to "direct" employees and "assign work." The FLRA concluded that development and application of performance standards were within the scope of these rights reserved to management, since such standards would affect the manner in which employees could be expected to perform, including their level of output.[4]

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[4]Petitioner contends (Pet. 23) that there is a difference between directing and assigning work to an employee, on the one hand, and making post hoc decisions about the consequences of an employee's success or failure in carrying out such directions or assignments. But performance standards inevitably have more than a post hoc effect if they are applied properly. As the FLRA concluded in *Bureau of the Public Debt* (Pet. App. 73a), performance standards "are not merely measures of employee performance. They go to the levels of output and the quality of the work product." The FLRA here recognized that Proposal IV would allow arbitrators to "render awards which would require the agency to use different critical elements or set different standards" (*id.* at 57a). Thus, such standards operate to establish requirements in connection with the agency's direction of employees and assignment of work.

Petitioner also criticizes the FLRA's reasoning on the ground that the proposals at issue here, unlike those in *Bureau of the Public Debt*, do not seek to quantify a measure of performance and therefore must be less intrusive (Pet. 22). The court of appeals correctly concluded that this distinction is not significant to the decision on negotiability (Pet. App. 15a). As the court of appeals found (*id.* at 15a-16a), the proposals

The FLRA's conclusion that the proposals at issue would interfere with management's statutory prerogative to "direct" employees and "assign work," and are therefore nonnegotiable under the terms of the statute, is clearly reasonable. Proposal III, which would require that petitioner be given an equal voice in development of measures of performance and that disputes be referred to the Federal Service Impasses Panel, obviously would restrict management's authority "by insisting that it be exercised only with union approval" (Pet. App. 14a, 16a).[5] It is equally clear that Proposal IV would restrict management authority, since it would "allow arbitrators to substitute their notions of proper [performance] standards and [critical job] elements for those of management" (*id.* at 16a). The court of appeals correctly concluded that there was no basis for upsetting the judgment of the body charged by Congress with deciding negotiability disputes in the first instance.

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here, while not expressed in numerical terms, would, if implemented, restrict management's authority significantly by substituting the judgment of union and arbitrator with respect to what performance standards and critical job elements are proper.

Petitioner suggests (Pet. 23-24) that the FLRA was primarily concerned that the proposals would delay the application of a standard and element to a particular employee. Nothing in the decision suggests that the FLRA based its conclusion on any such concern.

[5]The court of appeals properly rejected petitioner's contention (Pet. 16-17) that the FLRA's ruling effectively reads the Federal Service Impasses Panel out of the statute by allowing the FLRA to examine the merits of a proposal rather than simply its negotiability. The FLRA is charged by statute with resolving negotiability disputes, and the content of a proposal clearly has some relevance to negotiability. As the court of appeals pointed out (Pet. App. 18a n.88), petitioner's argument "would dictate that because any given employee proposal is simply a proposal, not yet a command to management, it is a proper subject of mandatory bargaining between employees and management." Of course, the Federal Service Impasses Panel retains its full statutory responsibility for resolving impasses that arise in the course of collective bargaining on negotiable issues.

The FLRA's conclusion is consistent with the legislative history of the Act. Petitioner points to various statements by Members of Congress to the effect that the management rights provision of the statute should be given a narrow reading (Pet. 17-19). But other statements in the legislative history make it clear that Congress intended the reservation of management rights to be meaningful.[6] Thus, the statements cited by petitioner cannot be read in isolation. Moreover, there are numerous indications, including statements in the House and Senate reports, that Congress intended the Act to be interpreted in a manner consistent with an effective and efficient government. See, *e.g.*, S. Rep. No. 95-969, 95th Cong., 2d Sess. 2-4 (1978); H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 3 (1978); and other legislative history cited at Pet. App. 34a. The Act itself contains a provision to that effect. See 5 U.S.C. (Supp. V) 7101(b). As the court of appeals recognized in *National Treasury Employees Union* v. *FLRA*, 691 F.2d 553 (D.C. Cir. 1982), reservation to management of the formulation of performance standards and critical job elements furthers this legislative goal (Pet. App. 38a-39a):

> Without a doubt, the right to determine what work will be done, and by whom and when it is to be done, is at the very core of successful management of the employer's business. * * * The Authority's construction of

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[6]See, *e.g.*, 124 Cong. Rec. 29187 (1978) (remarks of Rep. Clay); *id.* at 29199 (remarks of Rep. W. Ford).

Petitioner also cites (Pet. 19-20) a statement by the Director of the Office of Personnel Management during hearings on the legislation. While that statement suggests that some aspects of performance appraisal systems, including development of performance standards, might be subject to bargaining, no such suggestion was made by Congress itself. Instead, Representative Udall addressed bargaining about standards for establishing promotion certificates, but made no reference to performance standards. See 124 Cong. Rec. 29174 (1978); Pet. App. 9a-12a, 74a-75a.

> Section 7106(a) as a reservation of this invaluable right to management, thereby insulating it from dilution at the bargaining table, is thus fully obedient to the congressional command that the Act be interpreted in a manner consistent with the exigencies of efficient government.

Petitioner points out that by its terms Section 7106(a) is "subject to" Section 7106(b), which states that negotiation will not be precluded with respect to "procedures which management officials of the agency will observe in exercising any authority under this section." Petitioner contends that the proposals at issue here relate to "procedures" rather than substance and thus are negotiable under Section 7106(b). However, as the court of appeals recognized (Pet. App. 13a, quoting *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1161 (D.C. Cir. 1981)), "demarcation of substance and procedure 'involves questions of judgment and balance, about which reasonable people could easily differ,' and was a task best performed by the Authority itself." Here the FLRA concluded that the proposals at issue would directly interfere with management rights and thus could not be characterized as procedural.[7] The court of appeals

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[7]Petitioner claims (Pet. 14-17) that the FLRA and the court of appeals erred in applying a "direct interference" test, rather than an "acting at all" test, in determining whether the proposals at issue are procedural or substantive. The District of Columbia Circuit has applied these two tests in different types of situations. In the case of "purely procedural steps," the court will find nonnegotiability only if a proposal precludes management from "acting at all;" in the case of proposals cast in procedural language but impinging on substantive management decisions the court will find nonnegotiability if implementation would "directly interfere" with the exercise of reserved management rights (Pet. App. 13a). The proposals at issue here were clearly more than "purely procedural steps."

In petitioner's view (Pet. 12), "the statute places no limitation on the right of parties to negotiate procedures relating to the direction of

affirmed this judgment, correctly noting that the disputed proposals "can, at best, be described as propositions cloaked in procedural garb which encroach upon management's substantive authority" (Pet. App. 14a). Indeed, the court found that petitioner's approach to whether proposals are procedural or substantive is "unduly literal" and "would eviscerate all of the management rights that Section 7106(a) is designed to protect" (*id.* at 13a).

Petitioner urges that the proposals at issue here must be negotiable because, in passing the Labor-Management Act, Congress intended to broaden the scope of collective bargaining over conditions of employment and especially to provide for employee participation in performance appraisal systems, pursuant to 5 U.S.C. (Supp. V) 4302(a). Petitioner's suggestion (Pet. 10-11) that the decision of the court below undermines this congressional intent is misguided. Under the terms of the statute the duty to bargain does not extend to proposals inconsistent with federal law or regulations. See 5 U.S.C. (Supp. V) 7117(a)(1). While there is no question that Congress intended to broaden the scope of collective bargaining in some respects, it is equally clear that that process was to be subject to the reservation of management rights in 5 U.S.C. (Supp. V) 7106(a).[8]

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employees or the assignment of work, even if a proposal would somehow 'interfere' with managerial authority in this area." That view is simply too narrow; its effect is to read out of the statute the reservation of management rights found in Section 7106(a).

[8]Petitioner contends that because Congress intended to broaden the scope of collective bargaining the present case cannot be reconciled with the decision of the Federal Labor Relations Council (the predecessor of the FLRA) in *Patent Office Professional Association* and *U.S. Patent Office*, 3 F.L.R.C. 635 (1967). In *Patent Office*, the Council found that certain proposals concerning production expectations for employees were negotiable. The FLRA specifically considered the relevance of *Patent Office* in its decision in *Bureau of the Public Debt* (Pet. App. 62a-83a). It concluded there that *Patent Office* was inapplicable

Moreover, Section 4302(a) does not require that agency encouragement of employee participation in establishing performance standards take the form of union participation in formulation of such standards. As both the court below and the FLRA have recognized (see Pet. App. 41a-42a, 76a-80a), such employee participation may occur in a variety of ways, some of which involve collective bargaining with respect to certain aspects of the performance appraisal process. This view is consistent with that of the Office of Personnel Management (*id.* at 42a, 79a). The decision in this case in no way undermines Section 4302(a).

2. Petitioner suggests (Pet. 25-26) that this Court should grant certiorari because of the importance and recurring nature of issues concerning the scope of federal sector collective bargaining and management rights. In fact, the first cases addressing the negotiability of performance standards and critical job elements under the 1978 Labor-Management Act have only recently been decided by the courts of appeals. Other such cases are now pending,[9] and no conflicts between the courts of appeals have yet developed in this area. Thus, consideration by the Court of the issues presented by this case appears both unnecessary and premature.

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because, *inter alia*, the performance standards and critical elements now relevant are governed by the requirements of Title II of the Civil Service Reform Act, 5 U.S.C. (Supp. V) 4301 *et seq.*, which "differ appreciably from the performance appraisal practices which were in effect at the time of the Council's decision" (Pet. App. 73a).

[9]See, *e.g.*, *American Federation of Government Employees, AFL-CIO, Local 1923* v. *FLRA*, appeal pending, No. 82-1483 (4th Cir.); *National Treasury Employees Union* v. *FLRA*, No. 82-7154 (9th Cir. Mar. 14, 1983) (remanding for further explanation of FLRA reasoning).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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